



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 - incomplete answer

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

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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**



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, where*

- (i) there is a risk that assets will be dissipated; or*
- (ii) a need for independent supervision and control; or*
- (iii) A restructuring capable of being achieved under the supervision of an independent Court officer and with the benefit of a stay of other legal proceedings.*

*When there is credible prospect of success and the support of a majority of creditors to vote in favour of a formal or informal restructuring plan, the court may appoint a "soft-touch" provisional liquidators or provisional liquidators with specific powers to implement a restructuring plans.*

*The Court may also appoint a provisional liquidator where the company has illiquidity issue that prevented its ability to pursue a scheme of arrangements and the creditors is initiating litigation to wind up the company.*

*This is a good effort, but slightly misstates the range of circumstances, and the threshold test, for appointing a PL.*

*3 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?***

*In Bermuda, set-off is compulsory for liquidation company, under Section 37 of the Bankruptcy Act 1989 whereby the debtor company has mutual credits, mutual debts or other mutual dealings with its creditors which are proving or claiming to prove a debt.*

*Set-off can only be exercised after the commencement of a liquidation if:*

- (i) The debts giving rise to the set-off were incurred prior to the commencement of liquidation and have crystallised as monetary payment liabilities;*

- (ii) *The transaction giving rise to the debts was not a fraudulent preference or a fraudulent conveyance; or*
- (iii) *The dealings between the parties were mutual (the same legal entities for the mutual dealings).*

*Set-off is not allowed where the creditor had, at the time of giving credit to the debtor, notice of an act of insolvency committed by the debtor and available against him.*

**Correct**  
**2 marks**

Question 2.3 [maximum 4 marks]

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

*A creditor may take security over assets under Bermuda law by agreement between the creditor and the debtor and below are 3 possible ways:*

- 1. Fixed charge;*
- 2. Floating charge; and*
- 3. Lien.*

*Fixed charge is common security for immovable, movable and certain intangible property, which is fixed to a particular asset eg. land, factory and building. Creditors' consent is required for any sale and disposal of assets under fixed charge.*

*Floating charge is common security for movable and certain intangible property, which is not fixed to a particular asset eg. stock, work-in-process and receivables. Creditor's prior consent is not required for the sale and disposal of assets under floating charge. Floating charge is crystallised and convert into a fixed charge once the debtor is in default/breach the agreement.*

*Lien is the right to retain possession of another person's property until that person performs a specific obligation. The property under lien is not for security purposes but is for some other purposes, such as safe custody or repair.*

*Although there is no time limits for registration of the security, these securities should be properly registered with the Registrar of Companies in Bermuda to protect itself against competing claims or interest.*

**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. It has no statutory [\[provision\]](#) to implement the UNCITRAL Model Law on Cross-Border Insolvency.*

*Bermuda is a common law jurisdiction. Under common law, it may recognise liquidators appointed by the court of the company's domicile and the effects of a winding-up order made by the court, and has discretion pursuant to such recognition to assist the primary liquidation court by doing whatever it could have done in the case of a domestic insolvency.*

*The Supreme Court of Bermuda has clarified the rules for granting common law recognition and assistance to foreign liquidators following the Privy Council decisions in *Singularis Holdings Limited v PricewaterhouseCoopers* and *PricewaterhouseCoopers v Saad Investments Company Limited*. The Bermuda Court is willing to recognise foreign liquidators applying under common law and it is limited to granting assistance in circumstances where:*

- *the relevant company is incorporated in Bermuda;*
- *the subject company has assets located in the jurisdiction;*
- *the liquidators seek assistance that would be available to them both under the law of the foreign jurisdiction and under Bermuda law; and*
- *such recognition and cooperation are not contrary to Bermuda public policy.*

*The Privy Council will analyse each case and the nature of the power the foreign liquidator is seeking from Bermuda Court, to consider the appropriate assistance to be granted.*

*Circumstances where foreign liquidators might not be granted recognition and assistance include the following:*

- *there is no active assistance being requested (*Stephen John Hunt v Transworld Payment Solutions UK Limited*);*
- *The sole purpose was to enable the liquidator to obtain evidence for use in contemplated litigation (*Stephen John Hunt v Transworld Payment Solutions UK Limited*);*
- *voluntary liquidation - the foreign liquidators could have done it themselves under the law in their jurisdiction;*
- *Unjust or contrary to public policy in Bermuda;*
- *Where the Minister of Finance in Bermuda had not granted a permit for a foreign/overseas companies to carry on business in Bermuda (*PricewaterhouseCoopers v Saad Investments Company Limited*);*
- *Where there is no asset in the Bermuda for the liquidator to take control of.*

Largely correct - subject to typographical errors.

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 court judgment has no direct legal effect in Bermuda. It is not enforceable in Bermuda until under certain steps are taken.*

*There are 2 sets of rules to recognise or enforce foreign judgment, depending on the nature of the foreign judgment seeking recognition or enforcement.*

- (1) Several statutory rules and*
- (2) Common law rules.*

*Under these rules, a foreign judgment will not be registered or enforced where:*

- It is not covered by the 1958 Act;*
- If the foreign court had no jurisdiction;*
- If the defendant did not receive notice of the foreign proceedings;*
- If the foreign judgement was obtained by fraud;*
- If the rights under the foreign judgment are not vested in the person making the application for enforcement;*
- Of if the foreign judgment conflicts with another prior, inconsistent judgement from another court with competent jurisdiction;*
- If the foreign judgment is not final and conclusive;*
- If the foreign judgment is for taxes, fines or penalties;*
- If enforcement of the foreign judgment is contrary to Bermuda public policy, except for the case of the 1958 Act, following the Masri case.*

*It is not certain that a foreign scheme of arrangement can be recognised and enforced in Bermuda if there is no parallel local scheme of arrangement implemented in Bermuda. It is yet to be tested. However, the Supreme Court of Bermuda demonstrated some willingness to recognise foreign court orders approving foreign schemes provided there is no objection/contested. It is yet to be seen what position Bermuda Court will take in the event the foreign order is contentious.*

*This is largely correct, although a little bit superficial and there are a few typographical errors.*

**6 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.**

*Pursuant to Section 162 of the Companies Act 1981 ("1981 Act"), the Company is deemed to be unable to pay its debts when it failed to satisfy or neglected the US bondholders' statutory demand served on it for 21 days. Under Section 161 of the 1981 Act, the Company may be compulsorily wound up by the Court. In view that the Company is unable to pay its debt, it is also deemed as insolvent.*

*Since, the Company is insolvent, the directors owe a duty to its creditors, not the shareholders. Hence the US bondholders can take actions against the directors for the following:*

- (a) fraudulent trading (Section 246 of the Act) because the director has knowingly caused or allowed the Company to continue trading and even incurring new liabilities by borrowing an additional USD 50 million from its bank, Lendbank.*
- (b) breach of fiduciary duty and failure to exercise reasonable skill and care (Section 97 of the Act) because the directors knowing that the Company is insolvent did not take actions to rescue the Company, protect the assets of the Company for its creditors nor did they petition for the Company to be wound-up in the court or pass resolution to place the Company under Creditors' voluntary liquidation. The directors also did not petition for a receiver order to protect the Company's assets.*
- (c) unlawful return of capital (Section 54 of the Act) because the directors is not supposed to declare and pay dividend to the Company's shareholders when he is aware that the Company is insolvent or becoming insolvent. Upon liquidation, liquidators can void the transactions and claw back the amount of USD50 million from the directors' bonus and the shareholders' dividend.*

*The US bondholders can pursue after the directors personally as directors are personally liable for the above actions.*

*The US bondholders can also apply under section 243 to 248 of the Act to charge the directors for criminal offences because the Company had fraudulently misrepresented its financial performance in the offering documents associated with the bonds.*

*Regarding the floating charge given to Lendbank for the loan of USD50 million, under Section 239 of the Act, the floating charge is invalid because it was created while the Company was insolvent and if the Company commenced winding-up within 12 months from the creation of the floating charge.*

Regarding the money that was transferred to the Company's indirect subsidiaries in the PRC, it is opened for attack either under fraudulent conveyances, fraudulent preferences and/or onerous transactions as it was incapable of being returned due to PRC's local currency control restrictions and associated Chinese legal issues. This can be viewed as the directors intentionally put the money/assets beyond the reach of its other creditors.

Bermuda practices common law and is considered a creditor-friendly jurisdiction. The US Bondholders can apply under common law to seek recovery of their claims.

**Bondholder is a secured creditor. They can generally enforce their security outside of the insolvency process and they have the first claim over the company's assets. This is not correct.**

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The US Bondholder may also apply section 170(2) of the Act for the Court to appoint a provisional liquidator to preserve the Company's assets on urgent basis to prevent the Company's assets from dissipated further, because the directors had acted against the interest of the creditors. The Supreme Court of Bermuda has jurisdiction to wind up the Company because it was incorporated in Bermuda.

The Bondholder may initiate litigation or petition to wind up the Company. However, they should investigate and consider whether it is worth the cost and whether there are any assets available in the Company which has sufficient value for them to pursue.

**In Bermuda, personal bankruptcies are rare because it is generally considered to be inefficient, expensive, and time-consuming process. Hence, although there are many sections and charges the Bondholders can bring against the directors, it is not advisable. This overstates the position, since the directors may well have assets and/or insurance.**

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The directors in Bermuda usually have indemnity from the Company hence, it is not effective to pursue against the directors. **Again, this assumes that they will be covered by an enforceable indemnity.**

The better option for the Bondholder is receivership. **This does not make sense, and seems to confuse receivership with liquidation.** Next best option is to liquidate the Company since secured creditor has first bite to the Company's assets. **This is not obviously correct.**

**This is a good effort, but it includes quite a few errors of reasoning.**

**4 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).**

*If there is credible prospect that the Company can go through a scheme of arrangement to restructure itself and trade out of its financial difficulties, then Bercoffee Limited may apply to court to either stay a winding-up petition, if such petition has been initiated, or apply to court to sanction its scheme which must have the support of its majority creditors representing at least 75% in value. It can also apply for the court to appoint a “soft-touch” provisional liquidators to protect the proposed scheme and oversees the restructuring once the scheme has been sanctioned by the court.*

*In view that the fund from the Bondholders had been remitted to PRC, it is better to take steps before the Hong Kong courts which has a co-operation mechanism with Mainland China. The Company has sufficient connection with Hong Kong as it has office in Hong Kong and substantial business in Hong Kong. In fact, the Court may consider the Company’s COMI to be in Hong Kong instead of Bermuda where it is only its incorporation place.*

*Parallel scheme in the place of incorporation has been questioned by the Hong Kong courts and the Hong Kong courts see it as antithesis of cross-border insolvency cooperation, hence it is not advisable to have parallel scheme in both Hong Kong and Bermuda if the main purpose is to take advantage of the cooperation mechanism between Hong Kong and China to try to take control of the assets/money in China.*

*If the debt restructuring involved a debt-for-equity swap and if the US Bondholders accepted the issuance of new shares in the Company in exchange for cancellation of their debt, it would be better for the Company as its debts had been cancelled although there is a change of shareholders (existing shareholders’ shares being cancelled). There is a 2<sup>nd</sup> life for the Company to continue its business and hopefully it can trade out of its financial difficulties. However, in the event, the Company is not successful to return to profitable position and ended up in liquidation again, the liquidation payment ranking of the US Bondholder from a secured creditor which rank in priority of all unsecured creditor, is now change to the last ranking as a shareholder of the Company.*

**Again, this makes an incorrect assumption regarding the bondholders’ status as unsecured creditors.**

*The debt-for-equity swap is only worthwhile provided the Company has good prospect and is able to be listed in a stock exchange, i.e. shares has market value and*



*can be easily sold in the stock exchange. Non-listed share is not an attractive option as it has no ready market value and cannot be easily turned into liquid cash. This overstates the position.*

*It is advisable for the US Bondholders to analyse and study the restructuring plan or proposed scheme carefully to check all assumptions made by the Company in deriving the scheme and projected cashflow. The US Bondholders should also consider the risk involved and duration taken for them to eventually dispose off the shares or receive dividend pay-out/repayment from the Company.*

*Again, this is a good effort, but suffers slightly from a lack of legal analysis, and some assumptions or assertions that are not fully reasoned.*

*6 marks.*

*TOTAL: 42 out of 50 marks.*

\* End of Assessment \*