



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

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

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 4 marks]

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In what circumstances may a provisional liquidator be appointed?

Section 170(2) of the Companies Act 1981 allows the Supreme Court of Bermuda ("the Court") to appoint a provisional liquidator between the presentation of a winding up petition and its final hearing, if for example a provisional liquidation is for the best interest of creditors. This can be if there is a risk of assets dissipating within the above mentioned period.

Additionally, the Court may also appoint a provisional liquidator if there is a real chance that management can present a restructuring of the Company, under the supervision of a court appointed officer, generally a qualified insolvency practitioner, with the benefit of a stay in other legal proceedings.

Correct, but a little but superficial regarding the threshold test.

2 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, under section 37 of the Bankruptcy Act 1989, can only be exercised after the commencement of a liquidation if

- *The debts give rise to set off were incurred prior to the commencement of the liquidation and have crystallised as monetary liabilities*
- *The transaction giving rise to the debts were not fraudulent.*
- *The dealings between the parties were mutual*

Correct, but also a little bit superficial and incomplete.

1 mark

Question 2.3 [maximum 4 marks]

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

- 1) *Legal Mortgage: the rights and title of the debtors property are transferred to the creditor as security for debt, and the debtor will keep ownership of the property but the legal title of the property will only be the debtors in settlement of full payment to the creditor*
- 2) *Equitable mortgage: The debtor remains the legal title holder but transfers the beneficial interest over to the creditor,*
- 3) *Fixed charge: creditor has the right to take possession of the property with a right of sale in the event of the debtor defaulting and the debtor may not deal*

with any property that is subject to a fixed charge without the consent of a creditor

Correct, but again, a little bit superficial and incomplete.

3 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.

On the basis that that many businesses registered in Bermuda are exempt business and are traded on other stock exchanges, it gives rises to winding-up procedures not only, in the Supreme Court of Bermuda but also in other foreign jurisdictions.

Therefore, there are a number of situations where a foreign liquidator can be granted recognition and assistance in Bermuda. A judgment order in a foreign court has no direct legal effect in Bermuda and it is important to understand that recognition and assistance of corporate foreign liquidators takes place under common law powers and not under statutory provisions, such as Chapter 15 of US Bankruptcy Code or section 426 of the UK Insolvency Act 1986. As a result of Cambridge Gas Transportation Corp v Navigator Holdings Plc it is a matter of common law that Bermuda my recognise foreign liquidators appointed by the Court of the liquidators domicile.

*It is, however, under debate as to the common law power for Bermuda courts to assist foreign liquidations. Ultimately, as per *Singularis Holdings Limited V PwC* and *PWC vs Saad investments limited* the judgements that came out were that there needs to be sufficient connect between the foreign courts jurisdiction and the foreign company to make it the most appropriate country to make a winding up order; there are assets, liabilities, documents of the foreign company in Bermuda and business has been conducted in Bermuda, there were directors in Bermuda; and there is no public policy reason under Bermudian Law which would be prejudice to Bermudian Creditors.*

*Where foreign liquidators, however may not be granted recognition and assistance would be where the foreign liquidator could not do something which they could not do under the law by which they were appointed i.e *Stephen John Hunt v Transworld**

Payment solutions UK Limited as pending litigation in England and Wales and other information gathering activities were available to all parties.

Additionally, it is unclear the position the Bermuda Court might take with respect to foreign schemes of arrangement.

Ultimately, the companies in Bermuda which are exempt often do business elsewhere and therefore the proceedings in Bermuda are usually ancillary and supporting proceeding, in the absence of any winding up in Bermuda.

This is a good effort, which is slightly handicapped by linguistic issues, and a relatively superficial analysis of the legal position.

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.

It is first important to mention that a foreign court judgement has no direct legal effect in Bermuda and steps need to be taken to have a foreign judgement legally enforced in Bermuda. There are both statutory and common law provisions which apply in order for a foreign judgement to be enforced in Bermuda.

Such statutory provisions under the Judgements (Reciprocal Enforcement) Act 1958 which relate to the enforcement of money judgements of superior courts in the UK and other commonwealth countries and also statutory rules with respect to maintenance orders under the Maintenance Orders (Reciprocal Enforcement) Act 1974 which relate to reciprocating countries. There are common laws subject to the statutory restrictions set out in section 7 of the Protection of Trading Interest Act 1981 applicable to the enforcement of final money judgements of foreign courts in the rest of the World and both statutory and common law rules to the recognition of foreign judgements either as a defence to the claim or as conclusive of an issue in the Bermuda proceeding

However, there are judgements which can be set aside on an application of any party against whom a registered judgement may be enforced. These include

It is not covered by the 1958 Act

The foreign court has no jurisdiction in the circumstance

The defendant did not receive notice of the proceeding in the foreign jurisdiction in sufficient time for them to defend

It was obtained by fraud

The rights are not vested in the person who the application for registration was made

*It is important to understand that the 1958 Act provides a procedure whereby a judgement rendered in the superior courts of the UK can be registered. Judgements of a foreign "inferior" court cannot be registered or enforced under the 1958 Act even if they have been transferred, registered or certified in the relevant foreign "superior court" for the purpose of enforcement. With respect to *Crossborder Capital Ltd v Overseas Partners Re Ltd* the judge ruled that the judgement made in the English High court was not capable of being registered as it was not given in a superior court of the UK as required.*

With respect to a foreign court sanction scheme arrangement there have been a number of restructuring cases in which solvent or insolvent companies with a Bermuda connection have been restructured with the use of a parallel scheme of arrangement which is sanctioned by the Bermudian Court and appropriate foreign courts, however even though the Supreme Court has shown some willingness to recognise foreign court orders approving foreign schemes there is some uncertainty with respect to contentious situations. Ultimately the Bermuda Court would want to determine whether the procedure would benefit the creditors as a whole to run a parallel scheme and would also want to understand where the main assets, creditor base, principal place of business of the company is before enforcing a scheme of arrangement

[Again, a good effort, with some minor 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.

As we understand the Company raised additional financing through the issuance of USD 500m bonds to US bond holders. The Company is an exempt company with holding company in BVI and indirect trading subsidiaries in the PRC.

Given that most companies are exempt countries in Bermuda it means that they are subject to not just winding-up proceedings in Bermuda but also in the foreign courts in which they operate.

This is fine, but a bit simplistic and repetitive of points made above.

*Firstly, given that the Company is incorporated in Bermuda then US creditors could bring a petition to the Supreme Court of Bermuda however as the Company is a parent company then it will be unlikely that there are any realisable assets. **[Really?]***

*Therefore, given that the principal place of business of the Company is in China, then the creditors could look to seek a winding up order in the PRC as well. **[Is this correct? what about Hong Kong? What about PRC legal difficulties?]** Also as the debt is governed by US law, then the creditors could seek to windup the company in the US **(really? How, and on what basis?)**. However, in the situation where the Company has been awarded a judgement against itself, then if the judgement were to be enforced in another jurisdiction such as the PRC, where there are assets of the Company, then the creditors would need to seek recognition of this foreign judgement.*

Given that the statutory demand, was ignored, and therefore the creditors best course of action would be to petition for a winding up in Bermuda where a provisional liquidator can be appointed, which will assist in ensuring that other assets are not sold from the Company before a meeting of creditors is held.

The creditors could take action against a number of different stakeholders. Firstly, given the Company had fraudulently misrepresented its financial performance, then they can take action against the company which they have done however they could also take action against the former auditors, if the company was audited, for negligence.

Given that the creditors have found out about the payment of a bonus, using additional financing, then should the company be wound up and liquidators appointed then the liquidator could seek to recover under fraudulent preferences given that the USD50m loan was intended to continue trading and for the best interest of other creditors, however the asset wh

This is a good effort, but somewhat superficial and incomplete.

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).

Bercoffee could look to enter into a scheme of arrangement with its creditors, in an attempt to restructure its debt as this is the only formal rescue procedure in the Companies Act 1981. It is not an intrinsically insolvency related procedure however it can be implemented after the appointment of a liquidator, for example where the appointment of a soft touch liquidator is concerned this allows Bercoffee to explore a scheme where liquidity issues are an issue and therefore less susceptible to litigation or compulsory winding up proceedings, as it has the protection of the provisional liquidation, “soft touch”

.It would make sense for the Company to placed in provisional liquidation, “light touch” so that the joint provisional liquidators can facilitate the implementation of the scheme . Such that a scheme is implemented the JPLs will be able to work with creditors directly to facilitate the introduction of the scheme and work out the best deal for creditors. The JPLs could even set up an informal committee which acts as a sounding board for the body of creditors. The PL would then provide protection against litigation however would enable Bercoffee to facilitate a restructuring of the debt.

Given that the company is incorporated in Bermuda it would make sense to have the company in PL in Bermuda however to have a Hong Kong governed scheme as this is the where the place of business is. Having a scheme governed under Bermuda law would not be for the best interest of creditors. Parallel schemes in both Bermuda and Hong Kong might work however there are advantages and disadvantages associated with this, especially with the costs of both schemes being run and circumstances such as the Gibbs rule whereby debt governed by certain law will only extinguish certain debt.

There has to be significant update for a debt-to-equity swap to work, and there has to be value coming back to the now new shareholders by a way of investment. Expansion of the business was recently funded by shareholder contributions and therefore if the creditors were to convert their debt to equity would this mean that they would have to further contribute to the expansion of the business further. Some creditors will be hesitant to do this. Additionally, there are restrictions to PRC local monies and therefore it would be uncertain whether the shareholders would be able to receive any immediate return

This makes some good points, and is fairly thorough, although it could offer more detail, and attention to detail.

6 marks.

TOTAL: 37 out of 50 marks.

* End of Assessment *