



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 - unanswered

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

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

Question 2.1 [maximum 4 marks]

In what circumstances may a provisional liquidator be appointed?

Formatted: Font: (Default) Avenir Next, 11 pt, Font color: Red

Formatted: Normal, No bullets or numbering

[A provisional liquidator can be appointed on a “soft-touch” basis for the purpose of implementing a restructuring which is designed to support formal and informal restructuring plan with credible prospects of success and with the support of the majority of creditors

The Official Receiver may be appointed as a provisional liquidator in a compulsory liquidation

A provisional liquidator may be appointment in a compulsory liquidation

A provisional liquidator may be appointment for purposes of assisting with a scheme of arrangement

A provisional liquidator may be appointment between the presentation of a winding-up petition and its final hearing

A provisional liquidator may also be appointed on an urgent basis where it is in the best interests of creditors, for example is there is a risk that the assets will be dissipated between the presentation of the petition and the final hearing, or where the restructuring can be achieved under the supervision of an independent court officer and with the benefit of a stay of other legal proceedings]

This is largely correct, but somewhat superficial and there are some linguistic errors that make some of the answers hard to follow.

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 can be exercised after the commencement of a liquidation in Bermuda if:

- The debts that give rise to the set-off are debts incurred prior to the commence of liquidation and have crystalized as monetary payment liabilities.*
- The transaction or transactions relating to the debts was/were not a fraudulent preference or a fraudulent conveyance;*
- The dealings between the parties were mutual - i.e. the parties that give rise to the debt are the same parties giving rise to the credit and the parties have contracted with each other in the same capacity. The set-off cannot be between third parties that have not contracted with each other for example]*

Correct

Question 2.3 [maximum 4 marks]

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

Formatted: Font color: Red, English (United States)

Formatted: Justified

[There are a number of ways in which a creditor may take and a debtor may give security.

Legal mortgage

- *Under a legal mortgage the title of a debtor's property is transferred to a creditor as the security for a debt. Under a legal mortgage, a debtor retains possession of the property but only regains legal title once the debt has been paid and satisfied and the reconveyance of the legal title by the creditor.*

Equitable mortgage

- *Under an equitable mortgage, unlike a legal mortgage, the debtor retains title to and possession of the property but transfers beneficial interest in the property to a creditor.*
- *In Bermuda an equitable mortgage does not take priority over a third party, who without notice of the creditor's beneficial interest in the property, acquires legal property in good faith and for value.*

Floating charge

- *For movable and various intangible property, a creditor can take a floating charge.*
- *A floating charge is not fixed to a particular asset but "floats" above a variety of assets.*
- *Under a floating charge, a debtor can deal with the assets and sell and dispose the assets without the creditor's prior consent. However, in the event of a default by the debtor, the floating charge crystallizes and converts into a fixed charge which "attaches" to specific assets remaining as at the date that the floating charge crystallizes.*
- *Property secured only by a floating charge is considered to be part of the debtor's general assets in the event of an insolvency.*

]

Correct

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.

[

The recognition and assistance of corporate foreign liquidators takes place under common law powers and not under any statutory powers, as would be the case in certain instances of foreign bankruptcies of individuals. Bermuda does not have a statutory equivalent for recognition such as Chapter 15 of the US Bankruptcy Code or section 426 of the UK's Insolvency Act 1986, or the UK's Cross Border Insolvency

Regulations 2006 where the US and UK have implemented the UNCITRAL Model Law on Cross-Border Insolvency.

Following a decision made by the Privy Council in Cambridge Gas Transportation Corp v Navigator Holdings plc, as a matter of common law the Supreme Court of Bermuda may recognize liquidators appointed by the court of the company's domicile and the effects of a winding-up order made by that court. The court has a discretion to assist the primary liquidation court by doing whatever it could have done in the case of domestic insolvency.

Based on recent cases, the scope of the common law powers to assist "by doing whatever it could have done in the case of a domestic insolvency" has been a matter subject to debate in a number of judgements such as Singularis Holdings Limited v PricewaterhouseCoopers and PricewaterhouseCoopers v Saad Investments Company Ltd. Depending on the facts of a case, the Bermuda court is likely to assist foreign liquidators to the fullest extent where:

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

The question of how far the court can go to assist foreign liquidators depends on the facts of each case and the nature of the power that the foreign liquidator has been asked to exercise. In Bermuda, the court cannot have power to assist liquidators to exercise powers to do something which they could not do under the law which they were appointed. The Court's exercise of its power must also be consistent with substantive law and public policy of the assisting court in Bermuda.

The court in Bermuda might also not grant recognition and assistance in circumstances where no active assistance has been requested, and any such assistance would be refused given pending litigation in other jurisdictions. A recent case where this happened was the case of *Stephen John Hunt v Transworld Payment Solution UK Limited*.

Based on the recognition precedent so far, it is not yet clear whether the Bermuda court would be willing to grant recognition and assistance in Bermuda in contentious

situations. This might also be a situation where a foreign liquidator might or might not be granted recognition in Bermuda.

Correct, subject only to some minor 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 judgment or order issued in a foreign court is not enforceable in Bermuda by itself and has not direct legal effect in Bermuda unless steps are taken to legally enforce the judgment in Bermuda]

Depending on the nature of the judgement, a judgement may be recognized in Bermuda pursuant to various statutory rules or common law rules.

A foreign judgement can be set aside where the Supreme Court of Bermuda is satisfied that:

- *The judgement is not covered by the 1958 Act or was registered in contravention of the 1958 Act*
- *The foreign court had no jurisdiction in the circumstances of the case*
- *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*
- *It was obtained by fraud*
- *The rights under it are not vested in the person by whom the application was made.*
- *The matter in dispute in the proceedings giving rise to the registered judgement had been subject to a final and conclusive judgement previously.*
- *The foreign judgment conflicts with another prior judgement from another court with competent jurisdiction*

This slightly confuses the concepts of recognition and enforcement with 'setting aside'.

Under common law, and applicable in Bermuda, a foreign money judgment will not be recognized and registered in Bermuda unless:

- *The judgment is final and conclusive in the foreign court*
- *The judgment was obtained in a court of law which had jurisdiction over the judgement debtor*

- *The judgment was not obtained by fraud*
- *The judgement was not in respect of taxes, fines or penalties*
- *The enforcement of the judgment would not contravene the public policy of Bermuda*
- *The rules of natural justice were observed in the foreign proceedings.*

The Court in Bermuda follows the principles of common law of England in recognizing and enforcing foreign judgments.

However, the court will not set aside a judgement on the grounds that it is not just or convenient to enforce the foreign judgement in Bermuda, or on public policy grounds.

This sentence is inconsistent with the paragraphs above.

Based on current legislation in Bermuda, there is some uncertainty as to whether a foreign court sanctioned scheme of arrangement might be registered or enforced in Bermuda, in the absence of a local scheme of arrangement being implemented in parallel. It is also not clear what position the court in Bermuda would take in a contentious matter. Historically, however, the Bermuda court has shown willingness to recognize foreign court orders which approve foreign schemes in Bermuda.]

5 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.

[Since the entity is incorporated in Bermuda, the US bondholders can filing a winding up petition against the Company in Bermuda entity and place the Company into liquidation.

The US bondholders could also start legal action against:

- **the directors of the Company for:**
 - o **borrowing additional funds while the company was on the verge of insolvency**
 - o **paying themselves out of the loan that was provided by the Bank**
 - o **authorizing the dividend to the shareholders of the company**
- **the Bank - for providing further funding to the Company while it was on the verge of insolvency. However, in taking action against the Bank, the creditors must consider whether any new lending was provided. Where new lending was provided, the suit against the bank may be hard to prove as a**
- **The shareholders - the bondholders can also start a law suit against the shareholder for accepting the payout just before the company went into insolvency**

The Bondholders might take action in the US, in case the bonds are governed by US Law.

To the extent that a regular [regulator?] is involved, the bondholders could consider involving the Securities and Exchange Commission and the Bermuda Monetary Authority and the equivalent authority in Hong Kong, where the entity also has its principal place of business.

The bondholders should also consider the action that might be taken in Hong Kong and the BVI against the Company.

[Part of the point of the question is for the student to consider what action might be available in Hong Kong and BVI].

As discussed above, once an order is granted in Bermuda, following a winding up petition, the bondholders can seek recognition in the BVI and in Hong Kong in order to take over the assets of the Company.

Litigation proceedings might not be very effective in this case against the Company. While litigation might be easy to commence against the parties, litigation tends to be costly and will take a long time to resolve. The US bondholders would need to engage legal counsel and brief them of the matter and commence a lawsuit in different jurisdictions. This will be costly as the bondholders will also need legal representation in the foreign jurisdictions.

Another drawback of litigation is the moratorium on legal proceedings, once a winding up order is granted, lawsuits against the company cannot be proceeded or commenced. The Company might therefore benefit from a moratorium, however, the bondholders' efforts to file a lawsuit would be frustrated.

The transactions would need to be reviewed to assess the floating charges in order to assess whether the company was solvent at the time that the floating charges were being created. From the information available, it appears that the company was not solvent at the time of the creation of the floating charge. The Company was not solvent at the time that the floating charge was issued because there was an outstanding statutory demand from the bondholders that had not been settled.

The US bondholders can also seek to recover the amounts paid to the directors as fraudulent preferences because, the company borrowed funds, then the directors paid themselves bonuses and also made payments to the shareholders. The winding petition should be filed by the bondholders before the lookback period of six months from the time that the transfer occurred.]

This is quite a thorough and thoughtful answer, but deals with some points rather superficially.

6 marks

Question 4.2 [maximum 8 marks]

To what extent would it be open to Bercoffee Limited to try to take steps to restructure its debt obligations, and how and where could it do so? Consider whether it would be more appropriate to take steps before the Hong Kong courts, the Bermuda courts, or both and, if so, why? Also consider whether it would make any difference if the debt restructuring involved a “debt-for-equity” swap, (that is, if the US bondholders would be issued new shares in the Company in exchange for cancellation of their debt, with existing shareholders’ shares in the Company being cancelled).

[Bercoffee Limited can try to restructure through the corporate rescue mechanisms in Bermuda which are mainly provisional liquidation and a scheme of arrangement.

The directors should consider a scheme of arrangement where they enter into an agreement with the creditors of the company in order to scheme the debts of the Company. However, while this option is provided in the legal framework, the US bondholders might not be willing to consider the management’s restructuring or scheme proposal as the management has already proven that they are looking after their own interests first before considering the interests of other creditors.

This would benefit from a discussion as to the percentage/value thresholds needed to satisfy a Scheme.

Provisional liquidators may be appointed on a light touch basis and provided the management with an opportunity to present a restructuring proposal to the creditors of the Company. However, again while this is provided for in the legal framework the bondholders might not be willing to provide the directors with an opportunity to restructure the debt obligations as the directors are acting out of their own interests. However, if the directors were committed to acting with integrity then a light touch provisional liquidation would provide the company with some breathing room by way of a moratorium which would allow the Company to restructure its debts.

As entity has interests in Bermuda, BVI, Hong Kong and the Mainland, it would be prudent to have any proceedings that are commenced in Bermuda being recognized in those jurisdictions to the extent required. For example, in Bermuda a foreign court judgment is not considered effective until it is sanctioned by the Bermuda court. For this reason, the Company should consider coordinating the proceedings in both Bermuda and Hong Kong jurisdictions in order for any decisions that are sanctioned in the Bermuda court to be recognized and be effective in Hong Kong or any other relevant jurisdictions.

In international insolvencies, the Supreme Court of Bermuda has on occasion issued letters of request to foreign courts asking the foreign courts to recognize and provide assistance to liquidators of Bermuda based companies.

The Bondholders might want to consider the following for a debt-to-equity swap:

- *The existing shareholders’ shares will be cancelled and therefore the bondholders will now be the new shareholders. The key consideration here will be whether any of the amounts paid to the shareholders is recoverable*

- *The amount paid to the directors - the bondholders would need to consider how the bonus paid to the directors is treated. If the scheme result in that debt being "forgiven", the bondholders might not agree to a the debt to equity swap*
- *The bondholders will need to consider that in terms of ranking, the would be the "last in line" the last in priority and would only receive payment to the extent that there is a surplus. Without a surplus the shareholders will not receive any return.*

The bondholders should therefore consider whether they would be in a worse off position by virtue of the debt-to-equity swap.]

This is a thorough and considered answer, just a bit thin on the Scheme of Arrangement analysis.

6 marks

TOTAL: 43 out of 50 marks.

*** End of Assessment ***