



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

9 out of 10 marks.

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

Question 2.1 [maximum 4 marks]

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

Formatted: Normal, No bullets or numbering

In what circumstances may a provisional liquidator be appointed?

[Section 170(2) of the Companies Act allows the Supreme Court of Bermuda to appoint a provisional liquidator between the presentation of a winding up petition and its final hearing, provided that it is appropriate and in the best interests of creditors.]

There are a number of circumstances whereby the urgent appointment of provisional liquidators can be appropriate and in the best interests of creditors, take for example if there is a risk that assets will be dissipated in the period between the presentation of the petition and the final hearing, or where a restructuring is capable of being achieved under supervision of an independent Court officer.

Provisional liquidators have specific powers to implement a restructuring, designed to support formal and informal restructuring plans that have credible prospects of success and the support of the majority of creditors. It is important to note that the process is debtor-friendly as it allows the power to implement a management-led restructuring under the supervision of the Supreme Court of Bermuda as the board of directors retain control over the company.

This overlooks the fact that the JPLs' powers are specifically set out in their Order of appointment in any given case.

Where the consent of all relevant creditors is forthcoming, informal 'work-outs' are possible in practice. The negotiations may be protected by provisional liquidation where there is a risk that negotiations towards an informal work-out may be jeopardised by creditors instituting or continuing proceedings against the company seeking enforcement of their debts.

The hearing of the winding up petition is adjourned while the work-out plan is being negotiated. The entity would be under the protection of a statutory moratorium during the negotiations and if they are successful, the petition is dismissed. In contrast, if they prove to be unsuccessful, the petition can be restored for a final hearing.]

A good answer, but one mark lost for the point above.

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?

[Section 37 of the Bankruptcy Act 1989 applies to companies in liquidation and provides for mandatory set-off in the event of a liquidation in Bermuda. In particular, where there have been mutual credits, mutual debts or other mutual dealings, between a debtor company in compulsory liquidation and any other person proving

or claiming to prove a debt in the liquidation, an account shall be taken of what is due from the one party to the other in respect of the mutual dealings, and the sum due from the one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed on either side respectively.

A 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, if the transaction giving rise to the debts was not a fraudulent preference or a fraudulent conveyance or of the dealings between the parties were mutual.]

Correct

Question 2.3 [maximum 4 marks]

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

[There are numerous ways of taking security over assets under Bermuda law such as by way of legal mortgage, equitable mortgage, fixed charge, floating charge, pledge, contractual lien and assignment.

Legal mortgage, equitable mortgage and fixed charge can all be used in respect of immovable, movable and certain intangible property.

Under a legal mortgage, legal title of the debtor's property is transferred to the creditor as security for a debt. The debtor remains in possession of the property but only regains legal title upon payment and satisfaction of the debt and reconveyance of legal title by the creditor.

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

With a fixed charge over property, a transfer of legal or beneficial ownership does not occur, but the creditor has a right to take possession of the property with a right of sale in the event of default by the debtor. The proceeds of sale can be applied by the creditor towards payment of the debt in priority to unsecured creditors. The debtor may not deal with any property that is subject to a fixed charge without the consent of the creditor.]

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.

*[Recognition and assistance of corporate foreign liquidators takes place under common law powers in Bermuda and not as a result of any statutory provisions that apply to certain foreign bankruptcies of individuals. A judgement **[should be spelt judgment]** or order of a foreign court in Bermuda has no direct legal effect and is not enforceable in and of itself. A foreign judgment maybe be recognised or enforceable pursuant to statutory rules or common law rules. The court of Bermuda have stated that as a matter of common law, following the Privy Council decision in Cambridge Gas Transportation Corp v Navigator Holdings plc, that they may recognise liquidators appointed by the Court of the company's domicile and the effects of a winding up order made by that court, and would therefore have the discretion to assist the primary liquidation court by doing what they do in a domestic insolvency case.*

The scope however by which the Supreme Court of Bermuda can assist is case-specific as detailed in Singularis Holdings Limited v PwC and the PwC v Saad Investments Company Limited. Both the facts presented in each case and the nature of the power the Supreme Court of Bermuda is being asked to exercise will determine what assistance under common law the Supreme Court of Bermuda is able to provide. The extent that assistance is granted is limited to the extent that assistance is available by both the Bermudian court and the foreign court.

The Bermuda Court is likely to recognise the winding-up orders of foreign court's and to assist foreign liquidators to the fullest extent possible, in circumstances where:

- *There is sufficient connection between the foreign court's jurisdiction and the foreign company making it the most convenient jurisdiction to make a winding-up order and appoint a foreign liquidator.*
- *There are documents, assets or liabilities of the foreign company within the Bermuda jurisdiction or directors, officers, managers, service providers etc. within Bermuda*
- *The foreign company has conducted business within Bermuda*

In the recent case Stephen John Hunt v Transworld Payment Solutions UK Limited, the Supreme Court of Bermuda declined to recognise the appointment of a UK liquidator (foreign) in circumstances where no active assistance had yet been requested, and any such potential assistance would probably have been refused, given pending litigation in England and Wales and other information-gathering mechanisms available to the parties.

It should be noted that it is unclear what position the court might take in a contentious situation despite the Supreme Court of Bermuda historically showing some willingness to recognise foreign court orders approving foreign schemes (when there is no opposition). This is due to common law in Bermuda prevailing more often than not.

[A good answer. 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.

[In general, a judgment or order of a foreign court has no direct legal effect in Bermuda. A foreign judgment is not enforceable in Bermuda in and of itself. To have a foreign judgment legally enforced in Bermuda, certain steps need to be taken in advance of doing so.

There are numerous recognised grounds for declining to enforce a foreign judgment in Bermuda. A foreign judgment registered under the 1958 Act can be set aside on an application of any party against whom a registered judgment may be enforced. The Supreme Court can set aside the registration of a foreign judgment if it is satisfied that:

- a) It is not covered by the 1958 Act*
- b) Foreign Court had no jurisdiction in the case circumstances*
- c) The defendant did not receive notice of the foreign proceedings within sufficient time*
- d) Foreign judgment was obtained by means of fraud*
- e) The rights under the foreign judgment are not vested in the person making the application for enforcement*
- f) The foreign judgment is not final and conclusive*
- g) The foreign judgment is for fines, taxes or penalties*

A scheme of arrangement is the only formal procedure and may be used to reorganise the business of a debtor to continue trading, this is set out in the Companies Act, 1981. Historically, the Supreme Court has show willingness to recognise foreign court orders, approving foreign schemes that were in the absence of opposition. Having said that, it remains unclear what position they might take in a contentious situation.

We have seen this in some common law cases the element of uncertainty - take C&J Energy Services Ltd (2017) who successfully completed its financial restructuring and emerged from Chapter 11 bankruptcy, having satisfied all of the conditions to the effectiveness of its plan of reorganization. The issue at hand here was whether a foreign scheme of arrangement could be recognised and enforced in Bermuda as a matter of common law, in the absence of a local scheme implemented in parallel.]

[A thorough answer - 7 marks.](#)

QUESTION 4 (fact-based application-type question) [15 marks]

Bercoffee Limited (the Company) was incorporated in 2019 as an exempt Bermuda company; as the parent company in a group of companies with a direct subsidiary incorporated in the British Virgin Islands; with indirect trading subsidiaries incorporated in the People's Republic of China (PRC); and with offices and a substantial business presence in Hong Kong. The Company's trading operations in the PRC involves coffee shops and other retail businesses associated with coffee and hot drinks.

The Company issued a number of bonds to creditors based in the United States (US) with the face value of USD 500 million, with a view to raising additional capital (by way of debt funding) to fund the expansion of its business activities in the PRC (which had previously been funded with the benefit of shareholders' capital contributions).

It was subsequently disclosed that the Company had fraudulently misrepresented its financial performance in the offering documents associated with the bonds, with the consequence that the US bondholders were entitled to demand immediate repayment by the Company of the sum of USD 500 million, even though that money had already been transferred to the Company's indirect subsidiaries in the PRC, and was incapable of being returned due to local currency control restrictions and associated Chinese legal issues.

The US bondholders served a statutory demand on the Company in Bermuda, demanding repayment of the sum of USD 500 million within 21 days.

The Company's directors decided, however, that it was in the best interests of Bercoffee Limited and its shareholders to not satisfy the statutory demand but to ignore it for the time being, having regard also to the Chinese legal position, and with a view to trading through the Company's financial difficulties.

The Company's directors subsequently borrowed an additional USD 50 million from its bank, Lendbank, which loan is secured by way of a floating charge against all of the Company's shares and the assets of its subsidiaries. Out of the USD 50 million received from Lendbank, Bercoffee Limited's directors immediately paid themselves a bonus of USD 20 million and they also paid a dividend to the Company's shareholders in the sum of USD 30 million.

The US bondholders only found out about these transactions two weeks later, through a report received from a disgruntled former employee of Bercoffee Limited.

Using the facts above, answer the questions that follow:

Question 4.1 [maximum 7 marks]

What actions could the US bondholders take in order to try to recover some or all of the sum of USD 500 million from the Company or other parties? Please consider (a) the jurisdictions in which they could take such action, bearing in mind the potential need for enforcement; (b) the defendants against whom they could take such action; (c) the pros and cons of litigation as opposed to insolvency proceedings; and (d) the causes of action that may be available against the various potential defendants.

[a) Bercoffee Limited as a Bermuda company with indirect trading subsidiaries in the PRC and a substantial business presence in Hong Kong means that the judgments would be of a foreign court - which is not in and of itself, enforceable in Bermuda. [this sentence is hard to follow] Certain steps will need to be taken to have it legally enforceable in Bermuda in the first instance. The US bondholders in an effort to recover the assets could take action to have their statutory demand met in Bermuda. If the foreign money judgment falls under the 1958 Act or common law rule for recognition and enforcement then the Bermuda Courts will recognise and enforce the statutory demand made by the bondholders.

b) The Defendants against whom the bondholders could take action would include the Company's directors, for fraudulently misstating the bond offering documents and taking out a \$50mn loan only to pay themselves a large bonus and the company shareholders \$30mn.

c) pros and cons of litigation as opposed to insolvency proceedings: Upon the making up of a winding up order there may be no action commenced or continued against the court without leave of the court, but does automatic stay doesn't extend beyond Bermuda. Litigation would not bring in an automatic stay. A winding up order submission may be less costly for the US bondholders than going through the litigation process.

*d) the causes of action that may be available against the potential defendants, the directors and bond issuers: Assuming the directors had oversight of the fraudulent bond offering documents being issued, then the directors in addition to paying themselves a bonus and the shareholders a dividend would have the following causes of action. Pursuant to section 97 of the Companies Act 1981, and as a matter of common law, the director owes duties to the company to act honestly and in good faith with a view to protect and serve the best interests of the company. Additionally, under section 54 of the Act a company shall not pay a dividend if there are reasonable grounds for believing the company would be unable to pay its liabilities as the fall due.
]*

This answer has the potential for a good answer, but it is somewhat incomplete and imprecise.

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 Limited could submit an application to the court to undergo a debt restructuring by means of a provisional liquidation in Bermuda, given that the company was incorporated there in 2019. Provided this application and they enter into provisional liquidation, then Bercoffee could use a Scheme of Arrangement to reorganise the business with a view to continue trading. This would allow for a debt-for-equity swap also. The company could apply to the Hong Kong court or PRC court for provisional liquidation, or apply for foreign recognition. A secondary recognition would be required in Hong Kong / the PRC however as the winding up order in Bermuda doesn't extend beyond Bermuda.

Additionally, the Supreme Court of Bermuda has shown some willingness to recognise foreign court orders approving foreign schemes, meaning a foreign scheme of arrangement would be possible potentially in Hong Kong or the PRC. This is not a guarantee by any means however as this particular case appears to be a contentious situation.]

This shows a basic understanding of the subject matter, but is a much shorter and less complete answer than that of other candidates.

There is no discussion of the mechanics of a Scheme of Arrangement, or the pros and cons of seeking to implement a Scheme under the protection and subject to the supervision of a PL appointment.

There is no discussion of any of the potential legal issues associated with a debt for equity swap.

There is also no detailed discussion of the potential challenges associated with seeking relief in foreign courts.

2 marks

TOTAL: 39 out of 50.

Formatted: Left

*** End of Assessment ***