



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 - unmarked

Choose the correct answer:

- (a) Order (i), (ii), (iii) and (iv).**
- (b) Order (iii), (iv), (i) and (ii).**
- (c) Order (iii), (i), (iv) and (ii).**
- (d) Order (i), (iii), (iv) and (ii).**

Correct

Question 1.4

What percentage of unsecured creditors must vote in favour of a creditors' scheme of arrangement for it to be approved?

- (a) Over 50% in value.**
- (b) 50% or more in value.**
- (c) Over 75% in value.**
- (d) A majority of each class of creditors present and voting, representing 75% or more in value.**

Correct

Question 1.5

What is the clawback period for fraudulent preferences under section 237 of the Companies Act 1981?

- (a) Two years.**

(b) One month.

(c) Twelve months.

(d) Six months.

Correct

Question 1.6

What types of transactions are reviewable in the event of an insolvent liquidation?

(a) Only fraudulent conveyances.

(b) Only floating charges.

(c) Only post-petition dispositions.

(d) All of the above.

Correct

Question 1.7

How many insurance policyholders are required to present a petition for the winding-up of an insolvent insurance company under section 34 of the Insurance Act 1978?

(a) At least five.

(b) One is sufficient.

(c) At least 10 or more owning policies of an aggregate value of not less than BMD 50,000.

(d) At least 10.

Correct

Question 1.8

Where do secured creditors rank in a liquidation?

(a) Behind unsecured creditors.

(b) Behind preferential creditors.

(c) *Behind the costs and expenses of liquidation.*

(d) *In priority to all other creditors, since they can enforce their security outside of the liquidation.*

Correct

Question 1.9

Summary proceedings against a company's directors for breach of duty (or misfeasance) may be brought by a liquidator under the following provision of the Companies Act 1981:

(a) *Section 237 of the Companies Act 1981.*

(b) *Section 238 of the Companies Act 1981.*

(c) *Section 247 of the Companies Act 1981.*

(d) *Section 158 of the Companies Act 1981.*

Correct

Question 1.10

What is a segregated account representative of an insolvent Segregated Accounts Company required to do under section 10 of the Segregated Accounts Companies Act 2000?

(a) *Resign immediately.*

(b) *File a Suspicious Transaction Report forthwith.*

(c) *Make a written report to the Registrar of Companies within 30 days of reaching the view that there is a reasonable likelihood of a segregated account or the general account becoming insolvent.*

(d) *Notify the directors, creditors and account owners within 28 days.*

Correct

9 out of 10 marks

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

Question 2.1 [maximum 4 marks]

In what circumstances may a provisional liquidator be appointed?

A provisional liquidator may be appointed by the court, pursuant to s 170(2) of the Companies Act 1981. A provisional liquidator can be appointed in a situation where there is a risk that the company's assets will be dissipated in between the presentation of the winding up petition and the final hearing of that petition. A provisional liquidator may also be appointed where there is a need for independent supervision and control of the company.

A provisional liquidator may also be appointed for restructuring purposes as part of the "soft-touch" approach developed by the Supreme Court of Bermuda to support informal work-outs. Provisional liquidators may also be appointed in debtor-in-possession restructuring, as part of the "soft-touch" approach developed by the Bermudian courts, to implement a restructuring plan that has a credible chance of succeeding as well as the support of the creditors.

Correct - 4 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?

The right of set-off is provided for by s 37 of the Bankruptcy Act 1989. It can only be exercised where:

- a. the debts which give rise to the set-off had been incurred before the commencement of liquidation proceedings and had crystallised as monetary payment liabilities;
- b. the debts had not been incurred as a result of a transaction that was a fraudulent preference or fraudulent conveyance;
- c. there is mutuality in the dealings between the parties.

Correct - 2 marks

Question 2.3 [maximum 4 marks]

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

A legal mortgage may be given by a debtor in respect of immovable, movable and certain intangible property. Legal title to the debtor's property is transferred to the creditor as security for a debt. The debtor retains possession of the property. Once the debt has been repaid and satisfied, legal title is only returned to the debtor.

Alternatively, an equitable mortgage may also be given by a debtor in respect of immovable, movable and certain intangible property. Here, the debtor transfers the beneficial interest in the property to the creditor. A creditor does run a risk with an equitable mortgage and may not be able to realise their security in a situation where a third party acquires legal title to the property, in good faith and for value, without notice of the creditor's beneficial interest.

A fixed charge may also be taken over immovable, moveable and certain intangible property. A fixed charge gives the creditor the right to take possession of the property, and the right to sell it, in the event the debtor defaults. Upon exercising the power of sale, the proceeds can be applied by the creditor towards payment of the debt. This is done, in priority to, and without reference to unsecured creditors. Property which is the subject of a fixed charge may only be dealt with by the debtor with the creditor's consent.

A pledge may also be given in relation to movable and certain intangible property. The creditor takes delivery (actual or constructive) or possession of the property until the debt is repaid or discharged.

Correct - 4 marks

10 out of 10 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.

The basis on which foreign liquidators are granted recognition and assistance in Bermuda is rooted in the common law, and not pursuant to any statutory provisions. This is because Bermuda has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. The Supreme Court of Bermuda has affirmed the decision of the Privy Council in *Cambridge Gas Transportation Corp v Navigator Holdings plc* [2007] 1 AC 508 that liquidators appointed by the court of the company's domicile will be recognised as well as the effects of a winding-up order made by that court. The Bermudian courts also have a discretion pursuant to such recognition to assist the primary liquidation court by doing whatever could have been done in a case of domestic insolvency.

Foreign liquidators may not be granted recognition and assistance in cases where there is no sufficient connection between the foreign court's jurisdiction and the foreign company such that the foreign court would be the most appropriate jurisdiction to have made an order to wind up that foreign company and appoint a liquidator.

Recognition and assistance may also be denied where the liquidator cannot show that there is any connection between the foreign winding up proceedings and Bermuda (for instance, there are no documents, assets or liabilities of the foreign company within Bermuda jurisdiction, the foreign company has not conducted any business or does not have operations in Bermuda, the foreign company does not have any former directors, company managers and officers or service providers within Bermuda, and the foreign company is not, and does not need to be involved in litigation or arbitration within Bermuda).

Finally, recognition and assistance to the foreign liquidator may be denied where there is public policy to the contrary – for instance, where there is unfairness or prejudice to local Bermudian creditors.

[This is decent attempt at an answer, but it is on the briefer side than most - and only cites one case in support of the propositions above.](#)

6 out of 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.

Generally, a judgment or order of a foreign court does not have direct legal effect in Bermuda, and steps must be taken, pursuant to either the relevant common law or statutory rules, to have that foreign judgment recognised and enforced.

Foreign judgments which are registered under the Judgments (Reciprocal Enforcement) Act 1958 will be given effect as though it were a judgment rendered in Bermuda. A foreign judgment of a foreign "inferior court" cannot be registered under the Judgments (Reciprocal Enforcement) Act 1958 even if the case had been transferred, registered, or certified by the relevant foreign superior court for enforcement purposes. It was held in *Crossborder Capital Ltd v Overseas Partners Re Ltd* [2004] Bda LR 17 that an English County Court judgment, which had been transferred to the UK High Court for enforcement purposes, could not be registered or enforced in Bermuda under the Judgments (Reciprocal Enforcement) Act 1958. That judgment was not one given in the superior courts of the UK. It should be noted that the Judgments (Reciprocal Enforcement) Act 1958 only applies to judgments of the superior courts of the UK and certain Commonwealth countries and territories: see s 2 of the Judgments (Reciprocal Enforcement) Act 1958. This means that judgments of a superior court that is not of the UK or certain Commonwealth countries and territories (eg, Germany), may not be registered pursuant to the Act.

As for judgments which cannot be registered under the Judgments (Reciprocal Enforcement) Act 1958, they can only be enforced by way of action at common law. This is done by treating the foreign judgment as evidence of a debt. Under the common law rules, such a foreign judgment will not be enforced where:

- a. the judgment is not final and conclusive in the foreign court;
- b. the judgment had not been obtained in a court of law which had jurisdiction over the judgment debtor;
- c. the judgment had been procured by fraud;
- d. the judgment was in respect of taxes, fines or penalties;
- e. enforcing the judgment would contravene Bermuda's public policy; or
- f. there was a breach of natural justice in the foreign proceedings.

As to the recognition and enforcement of a foreign court-sanctioned scheme of arrangement, there is uncertainty as to whether this can be recognised and enforced in Bermuda, absent a parallel scheme of arrangement. The Supreme Court of Bermuda has been willing to recognise foreign court orders approving foreign schemes of arrangement, but those cases were not contentious.

Correct - 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) Because Bercoffee is an exempt Bermuda company, it is subject, not only to the winding-up jurisdiction of the Supreme Court of Bermuda, but also to the insolvency regime of the jurisdiction in which it carries on its business. Here, Bercoffee has indirect

trading subsidiaries incorporated in the People's Republic of China (PRC) as well as offices and a substantial business presence in Hong Kong. The bondholders could try to take action against the Company's indirect trading subsidiaries in the PRC, or in Hong Kong where the Company has a substantial business presence. The bondholders could also commence such action against the Company in Bermuda.

(b) Action could be taken against the following defendants:

- 1 The Company itself
- 2 The directors of the Company
- 3 Any business entities which the Company may have in Hong Kong
- 4 The Company's indirect trading subsidiaries in the PRC

(c) One advantage of litigation is that enforcement will be more straightforward as opposed to insolvency proceedings. For instance, if the bondholders sue the Company and/or its directors in Bermuda for fraudulent misrepresentation (since there is evidence to this effect), and the Bermudian court finds in favour of the bondholders, then the judgment will be enforceable in Bermuda as against the Company and/or its directors. If the bondholders sue the Company and/or its directors outside of Bermuda, and obtain judgment in their favour, it may be enforced in Bermuda as a foreign money judgment provided the conditions at common law are met (ie, the judgment is final and conclusive in the foreign court, and the judgment had not been obtained by fraud). The disadvantage of litigation is that the Company may well spend money to defend itself against the claim – this would reduce any funds available for distribution in insolvency proceedings. The most cost-effective and expeditious solution, in my view, is to commence insolvency proceedings against the Company, and to try and hold the Company's directors personally liable.

(d) These are the possible causes of action.

- 1 First, the US bondholders could sue the Company for fraudulent misrepresentation at common law since evidence to this effect was subsequently disclosed.
- 2 Second, the directors could be liable under s 247 of the Companies Act which provides that directors bear personal liability if they have misapplied or retained, or become liable or accountable for any money or property of the company, or if they have been guilty of any misfeasance or breach of trust in relation to the company. Here, that the directors had paid themselves a dividend of 20 mil despite knowing that a statutory demand had already been served on the Company in Bermuda, points to the conclusion that they had indeed misapplied the Company's property. That said, whether the directors are ultimately liable also depends on whether they are entitled to an indemnity (see *Peiris v Daniels* [2015] Bda LR 16). I would add that the payment of this dividend does put the directors in breach of s 54 of the Companies Act 1981 which provides that a company shall not declare a dividend if there are reasonable grounds to believe that the company is unable to pay its liabilities.
- 3 Third, the directors could be sued for breaches of their fiduciary duty and failure to exercise reasonable skill and care. Pursuant to s 97 of the Companies Act 1981, directors owe duties to the company. Further, at common law, it is accepted that a director is a fiduciary, and must act honestly and in good faith in the best interests of the company. Here, that the directors had paid themselves a bonus of 20 mil out after having been served the statutory demand, is arguably, a breach of their duties *qua* director.
- 4 I add that the directors could also be held personally liable for the sum of USD 50 mil pursuant to s 246 of the Companies Act 1981, which provides that directors who knowingly cause or allow a company to carry on business with the intent to defraud creditors of the company (including carrying on the business of the company when it is known to be insolvent) can be held personally liable.

- 5 Action could also be taken to invalidate the floating charge granted to Lendbank. S 239 of the Companies Act 1981 provides that a floating charge on the undertaking or property of a company created within 12 months of the commencement of winding-up shall be invalid, unless it is proven that the company, immediately after the creation of the floating charge, was solvent, except to the amount of cash paid of the company at the time of, or subsequent to the creation of the charge (together with interest at the statutory rate). More information would be required to determine if this is a viable course of action. This is because we only know the floating charge was granted after the bondholders had served their statutory demand. But we do not know if winding up proceedings had been brought within 12 months of the floating charge being created.

This a good and thoughtful answer - 7 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).

There are two ways in which Bercoffee could try to restructure its debt obligations. The first is through informal “work-outs” but this requires the consent of all relevant creditors. The second is through a scheme of arrangement – this, however, requires that a majority within each class of creditors (present and voting – including by proxy) representing 75% by value of that class votes in favour of the scheme (s 99 of the Companies Act 1981). Court approval must also be obtained, and a copy of the sanction order must be delivered to the Registrar of Companies. The order for the scheme of arrangement must be annexed to copies of the company’s memorandum of association issued subsequent to the order.

If there is a risk that negotiations towards an informal “work-out” will be imperilled by creditors instituting or continuing proceedings against the Company, negotiations can be protected by a “soft-touch” provisional liquidation (which is a procedure developed by the Bermudian courts to support work-outs). To do this, the Company should first bring a petition for winding-up before the Bermudian court and seek the appointment of a provisional liquidator who would then apply for a statutory stay of all proceedings against the Company while the work-out continues. This soft-touch provisional liquidation can also be done in relation to a scheme of arrangement – here the company’s board of directors would manage the scheme of arrangement process, under supervision by the provisional liquidator.

Bercoffee Limited could, and should, take steps to restructure its debt obligations in both Hong Kong and Bermuda. The Bermudian court does frequently approve parallel schemes between Bermuda and Hong Kong (as was noted in *Re Titan Petrochemicals Group* [2014] Bda LR 90). However, if Bercoffee Limited only chooses to obtain a scheme of arrangement in Hong Kong, and have that scheme recognised in Bermuda, absent any parallel scheme in Bermuda, there is uncertainty as to whether such a scheme can be recognised and enforced in Bermuda in common law (*Re C&J Energy Services Ltd* [2017] Bda LR 22).

It does make a difference if the debt restructuring involved a “debt-for-equity” swap – on the assumption that the bonds issued in the US are governed by US law. Here, the Gibbs Rule, which states that the proper law of a debt governs how it may be extinguished, comes into play. Both the Bermudian courts as well as the Hong Kong courts, which recognise and apply the Gibbs rule, may not recognise this debt-for-equity swap (see *Re Rare Earth Magnesium Technology Group Holdings Ltd* [2022] HKCFI 1686).

[This is also a good and thoughtful answer - 8 marks.](#)

[TOTAL: 47 out of 50 marks](#)

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*** End of Assessment ***