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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C**

**CAYMAN ISLANDS**

This is the **summative (formal) assessment** for **Module 5C** 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 5C**. 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.assessment5C]**. An example would be something along the following lines: 202223-336.assessment5C. **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 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**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**

Select the **correct answer**.

Once an application for a restructuring officer is filed:

1. No action may be commenced against the company without permission of the court.
2. No action may be continued against the company without permission of the provisional liquidator.
3. No action may be continued against the company without permission of the restructuring officer.
4. No action may be commenced against the company.

**Question 1.2**

Which of the following is **not** available to a corporate debtor in the Cayman Islands?

1. Appointment of a receiver.
2. Court-supervised liquidation.
3. Official liquidation.
4. Deed of Company Arrangement.

**Question 1.3**

Select the **correct answer**.

In a voluntary liquidation:

1. The company may cease trading where it is necessary and beneficial to the liquidation.
2. The company must cease trading except where it is necessary and beneficial to the liquidation.
3. The company must cease trading if it is necessary and beneficial to the liquidation.
4. The company may cease trading unless it is necessary and beneficial to the liquidation.

**Question 1.4**

Select the **correct answer**.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

1. A company incorporated in the Cayman Islands.
2. A company with property located in the Cayman Islands.
3. A company carrying on business in the Cayman Islands.
4. Any of the above.

**Question 1.5**

Select the **correct answer**.

In a provisional liquidation, the existing management:

1. Continues to be in control of the company.
2. Continues to be in control of the company subject to supervision by the court and the provisional liquidator.
3. May continue to be in control of the company subject to supervision by the provisional liquidator and the court.
4. Are prohibited from having any control of the company.

**Question 1.6**

Select the **correct answer**.

When a winding up order has been made, a secured creditor:

1. May enforce their security with leave of the court.
2. May enforce their security without leave of the court.
3. May enforce their security with leave of the court provided the liquidator is on notice of the application.
4. May not enforce their security until the liquidator has adjudicated on the proofs of debt.

**Question 1.7**

Select the **correct answer**.

Any payment or disposal of property to a creditor constitutes a voidable preference if:

1. It occurs in the six months before the deemed commencement of the company’s liquidation and at a time when it is unable to pay its debts and the dominant intention of the company’s directors was to give the applicable creditor a preference over other creditors.
2. It occurs in the six months before the deemed commencement of the company’s liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company’s directors was to give the applicable creditor a preference over other creditors.
3. It occurs in the six months before the deemed commencement of the company’s liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company’s directors was to give the applicable creditor a preference over other creditors.
4. It occurs in the six months before the deemed commencement of the company’s liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company’s directors was to give the applicable creditor a preference over other creditors.

**Question 1.8**

Which of the following **is not** a preferential debt ranking equally with the other four?

1. Sums due to company employees.
2. Taxes due to the Cayman Islands government.
3. Sums due to depositors (if the company is a bank).
4. Unsecured debts which are not subject to subordination agreements.
5. Amounts due to preferred shareholders.

**Question 1.9**

Select the **incorrect statement**.

A company may be wound up by the Grand Court if:

1. The company passes a special resolution requiring it to be wound up.
2. The company is unable to pay its debts.
3. The company is carrying on regulated business in the Cayman Islands without a license.
4. The company does not commence business within six months of incorporation.

**Question 1.10**

Select the **correct answer**.

In order for a proposed creditor scheme of arrangement to be approved:

1. 50% or more in number representing 75% or more in value of the creditors must agree.
2. More than 50% in number representing 75% or more in value of the creditors must agree.
3. 50% or more in number representing more than 75% of the creditors must agree.
4. More than 50% in number representing more than 75% of the creditors must agree.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 4 marks]**

Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?

Pursuant to Part XVII of the Companies Act, the Cayman Islands Grand Court has discretionary power to assist foreign bankruptcy proceedings. A foreign representative must convince the Court that it should exercise its discretion and grant ancillary relief to such foreign representative. The Court may grant the following ancillary relief:

1. Recognizing the foreign representative’s standing or ability to act on behalf of, or in the name of, the debtor in the Islands.

2. Enjoining the commencement or continuation of proceedings against the Debtor.

3. Staying the enforcement of any judgment against the Debtor.

4. Requiring that any person with information regarding the business or affairs of the Debtor be subject to examination and production of documents by the foreign representative.

5. Handing over of property of the Debtor to the foreign representative.

**Question 2.2 [maximum 3 marks]**

Outline the legal framework for the recognition of foreign judgements in the Cayman Islands.

Recognition of foreign judgment in the Cayman Islands can be obtained through the procedure established in the Foreign Judgment Reciprocal Enforcement Act (revision 1996), but only when the country seeking the enforcement of the judgment assures substantial reciprocity for the recognition of judgments entered in the Cayman Islands. The procedure is governed by Order 71 of the Grand Court Rules.

The foreign judgment has to be a final monetary judgment entered after the 1996 Act was made applicable to the foreign Country. Currently, the Act has been extended only to the Superior Courts of Australia.

**Question 2.3 [maximum 3 marks]**

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

Yes, a creditor can register its security over assets located in the Caymen Islands. This is done centrally within the company’s own register of mortgages and charges. See Section 54 of the Companies Act. The effect that this registration does is that it grants priority to the secured creditor over other secured creditors that are not registered. It also deems that a prospective purchaser will have notice of the registered security and will acquire the asset with the lien.

**QUESTION 3 (essay-type questions) [15 marks in total]**

**Question 3.1 [maximum 6 marks]**

Receivers have no role to play in a Cayman Islands insolvency scenario. Discuss.

A receiver is a temporary custodian of an asset designated either by contract with the secured creditor or appointed by the Court in specific circumstances. A privately appointed receiver’s role is to take control of an asset that has been given as collateral and maximize the same either through sale or collection of the income such asset generates and forward such proceeds to the secured creditor. If the receiver is appointed by the Court, then its role is generally to preserve the status quo and safeguard an asset or aid in judgment enforcement. Its powers are limited to those awarded by the Court.

Since secured creditors are not impacted by insolvency proceedings in the Caymen Islands because they can enforce their security interest irrespectively of the stay or moratorium that can be obtained through the insolvency proceedings, then any action taken by the receiver is not part of the insolvency proceeding. It can thus be concluded that they have no role in the insolvency scenario.

**Question 3.2 [maximum 9 marks]**

In the absence of a statutory prohibition on insolvent trading, is it possible for court appointed liquidators of an insolvent company, or creditors of such a company, to hold its former directors accountable by either seeking financial damages against those directors and / or by seeking to “claw back” any payments that those directors should not have made? If so, please explain the possible options.

The appointed liquidator can pursue an action against the former directors and claw back any payments made by the directors when the Debtor was insolvent, if the liquidator can prove that such payment constituted a breach of the director’s fiduciary duty. The case of Prospect Properties v McNeill, 1990-91 CILR-171, provides that once the Debtor becomes insolvent the fiduciary duty of the directors of a company is to act in the best interest of the company and to regard the interests of creditors.

Therefore, if the directors deplete the assets of the company, after the same becomes insolvent, they are disregarding the interests of creditors and thus breaching their fiduciary duty. Directors who disregard the interest of creditors to be paid and put the company in a position that it is unable to pay its creditors, commit such breach. A liquidator can proceed to collect against them for this action. Section 147 of the Companies Act can be made applicable to such situation if the liquidator can prove that the directors carried out the business of the company with the intent to defraud creditors and not pay them. This section allows the liquidator to seek an order to the Court against the directors in order to make the company whole for those amounts that were depleted in the breach of their fiduciary duty or in a fashion the Court deems proper.

**QUESTION 4 (fact-based application-type question) [maximum 15 marks in total]**

Punk Lizard is a company registered in the Cayman Islands. It operates liveaboard diving cruises across the Caribbean. Punk Lizard was founded by the Kraken family over 70 years ago. The family continues to own and manage the business.

Punk Lizard’s revenues are down in recent years, due to some well publicised safety issues. The business has only managed to stay afloat with the assistance of a very large loan from Turtle National Bank (TNB). TNB has lent Punk Lizard USD 900 million (USD 450 million of which is secured by a mortgage over half of Punk Lizard’s fleet).

The market for liveaboard diving remains strong, and financial forecast for Punk Lizard is relatively bright, however Punk Lizard has immediate solvency issues. It cannot afford to pay the ongoing costs associated with maintaining its fleet (electricity, maintenance, insurance, staff costs, rum etcetera) and it has fallen behind on the monthly repayments to TNB.

To make matters worse, Punk Lizard commissioned Harland & Wolff (H&W) to build five more dive boats shortly before the (lack of) safety issue hit the news. Punk Lizard has failed to pay for the H&W boats. H&W has secured an arbitration judgment from the ICC in London for USD 150 million. The award is payable within 28 days.

You are a Cayman Islands-based insolvency professional and have been approached to provide advice on the following:

1. What action can TNB take to protect its interests? (2 marks)
2. What action can H&W take to protect its interests? (2 marks)
3. What action can the unpaid employees take against Punk Lizard? (3 marks)
4. Does the Cayman Islands Court have jurisdiction over Punk Lizard? (1.5 marks)
5. Is there a legal route via which Punk Lizard can protect itself and seek to restructure? (3 marks)
6. Following on from (e) above, can the Kraken family continue play a part in running Punk Lizard during any restructuring process? (1 mark)
7. What factors will the Cayman Islands court take into consideration before approving any proposed restructuring? (2.5 marks)

The following alternatives are available to the stakeholders in this factual scenario:

a. TBN has a loan secured by a mortgage over half of Punk Lizard’s fleet. If the loan and security agreements executed allow the same it can proceed to enforce its lien to obtain payment of the outstanding loan and/or appoint a receiver to sell the collateral and pay TBN the proceeds of the sale. Since it will have an under secured portion of the loan it can also move in tandem for the winding up and official liquidation of Punk Lizard through a petition to the Cayman Islands Court and receive payment through such proceedings of any deficiency claim it may have.

b. H&W has a judgment obtained in London against Punk Lizard for the payment of the amounts owed. It can request payment of the judgment. Upon Punk Lizard’s inability or refusal to pay the same it can request the Cayman Islands’ Grand Court for the winding up for the official liquidation of Punk Lizard.

c. The unpaid employees of Punk Lizard can also move for the winding up for official liquidation of Punk Lizard as preferential creditors. They have the right to be paid before other creditors receive payment according to Section 141 of the Companies Act.

d. The Cayman Islands Court has jurisdiction over Punk Lizard since the company is registered in the Cayman Islands.

e. Punk Lizard has a two tiered restructuring or corporate rescue process available. It can first move under Sections 91A to 91 J for the appointment of a restructuring officer to avoid any action by its employees, TBN and H&W or obtain a stay of any action already filed by these creditors in order for it to provide a restructuring plan. It should file as soon as possible a Restructuring Petition with the Court to avoid additional loss and pre-empt any possible winding up procedure commenced by the creditors. Through this process it can solicit rescue financing to assist in the payment of its claims.

With respect to the amounts owed to TBN, Punk Lizard should commence negotiations for a restructuring of its secured debt to avoid its foreclosure or any enforcement of the mortgage. It can use part of the rescue financing for such negotiations. It can also negotiate the surrendering of part of the collateral in lieu of payment, if such action is commercially and financially viable considering its projections. After such private agreement is secured, it can move for a Creditor’s Scheme of Arrangement proceeding that incorporates the payment plan or restructured facility with TBN and any other payment plan for its other creditors. Through this proceeding it can have the Court approve the Creditor’s Scheme so that it is binding on all parties incorporated therein.

f. Following the filing of a Restructuring Officer Petition and the Creditor’s Scheme of Arrangement the Kraken family may remain managing the affairs of the company and its business. The appointment of the restructuring officer does not automatically displace management. It all depends on the reason for such petition and the terms of the appointing order. Since the restructuring petition is not based on mismanagement and is voluntary, there should be no reason why management could be displaced by the restructuring officer and the Court can allow that both the board and the restructuring officer work jointly to manage the company’s affairs.

g. The Cayman Court should consider the following factors when approving a restructuring proposal:

 1. The Court will first hold the Convening hearing and consider the class composition, any jurisdictional issues, adequacy of the Scheme documentation and notice to all stake holders.

 2. If creditors appear at the Convening hearing and present an objection to the proposed scheme then the Court must resolve this contested issue.

3. Thereafter the Scheme Meeting is held and if the scheme obtains the required accepting votes, then the Court holds the sanction hearing.

4. At the Sanction hearing, any dissenting creditor can oppose the scheme. The Court will then have to consider whether the approval of the scheme was reasonable, if each class was represented at the scheme meeting, if the majority acted bona fide, all notice periods were met and if the resolutions were carried by the requisite majority.

If these conditions were met to the satisfaction of the Court and objections posed by dissenting creditors were overruled, then the Scheme of Arrangement is sanctioned by the Court.

**\* End of Assessment \***