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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?

The Grand Court of the Cayman Islands does have the power to assist foreign bankruptcy proceedings. This power is primarily derived from **section 241 of the Companies Act** which states that upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of: -

1. recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
2. enjoining the commencement or staying the continuation of legal proceedings against a debtor;
3. staying the enforcement of any judgment against a debtor;
4. requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
5. ordering the turnover to a foreign representative of any property belonging to a debtor.

The Act further states that an ancillary order may only be made under subsection (1)(d) against the debtor itself or a person who was or is a relevant person as defined in section 103(1).

Further, in **Section 242 of the Companies Act**, the Cayman Islands Grand Court is guided by several key considerations aimed at ensuring an efficient and fair handling of a debtor's estate. These considerations include ensuring equitable treatment for all claimants, safeguarding local claim holders from undue inconvenience, preventing fraudulent or preferential transactions, and adhering to the established order of creditor priority. Additionally, the Court focuses on upholding the enforcement of secured interests created by the debtor, avoiding the enforcement of foreign taxes, fines, and penalties, and maintaining respect for international legal principles (comity). For debtors registered under Part IX, the Court also evaluates the necessity of issuing a winding-up order for the local branch in conjunction with any ancillary order.

Based on the foregoing, the specific circumstances and conditions under which the court may assist are generally shaped by the needs of the foreign proceedings and can include actions like staying proceedings, enforcing orders, or providing mechanisms for the coordination of Cayman Islands proceedings with those in foreign jurisdictions.

The Grand Court can exercise this power when it is necessary to ensure the efficient administration of justice, the protection of creditors, and the treatment of stakeholders in a manner that is consistent with the treatment they would receive in domestic proceedings.

**Question 2.2 [maximum 3 marks]**

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

In cross-border insolvency cases, the Grand Court employs a collaborative approach to facilitate an efficient winding-up process and safeguard the interests of creditors, regardless of their location. In the Cayman Islands, the recognition and enforcement of foreign judgments are primarily governed by a blend of statutory and common law mechanisms, reflecting the jurisdiction's cooperative stance in cross-border insolvency and legal cases to protect creditors' interests globally.

The Cayman Islands have not ratified international treaties for the reciprocal recognition of foreign judgments, except for the **New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**. This absence extends to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

**The Foreign Judgments Reciprocal Enforcement Act (1996 Revision)** establishes a framework for the recognition and enforcement of foreign judgments, conditional upon substantial reciprocity from the originating country. To date, this statute has only been extended to judgments from Australia’s Superior Courts as per **Order 71 of the Grand Court Rules**. For enforcement under this Act, the judgment must be final, pecuniary, and issued after the Act’s extension to the foreign country.

Outside of the statutory framework, foreign judgments may be enforced under **the provisions of the Grand Court Act and Rules**, through the filing of a new legal action in the Cayman Islands Grand Court, treating the foreign judgment as an unsatisfied debt. This will allow for the enforcement of both money and non-money judgments provided they meet the criteria set down as follows: - the judgment is final, the foreign court had jurisdiction over the debtor, the judgment was not obtained by fraud, the judgment does not contravene the public policy of the Cayman Islands; and it adheres to the principles of natural justice.

Both routes are subject to a six-year limitation period, starting from the date of the judgment or the final judgment if there were appeals.

**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, it is possible for a creditor to register its security over an asset in the Cayman Islands. The registration process and its effects are specified under different regulations depending on the type of asset involved. Security may be taken over immovable or movable assets.

Some of the possible ways through which security interests can be created over assets include the following: -

1. **Security over Real Property (Freehold or Leasehold)** - security over real property is secured through mortgages. Legal mortgages require the lender (mortgagee) to hold legal title to the property as security, which must be created by a Charge and registered in the Register of Lands. This registration informs third parties of the mortgage and ensures that the mortgagee has priority over subsequent interests over the property.
2. **Security over Movable Property** - Security over movable assets like ships and aircraft also involves registration in the respective asset registers (vessel or aircraft register).
3. Security interest can also be registered over shares by entering the secured creditor’s name in the register of members as the shareholder and the deposit of the share certificate with the secured creditor.

The effect of Registration of such security interests is as follows: -

1. **Notice to Third Parties** - Registration of a security interest provides notice to third parties, which is crucial for establishing legal priority over the asset against third-party claims.
2. **Priority** - Registered security interests have priority over later claims made by other creditors regarding the same asset. It ensures that the registered creditor is first in line for repayment from the proceeds of the asset if the debtor defaults.
3. **Enforcement** - Registered security can be enforced directly by the creditor, for instance by exercising the statutory power of sale without reference to the Court for leave to do so.

**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.

The statement that "*receivers have no role to play in a Cayman Islands insolvency scenario*" is not entirely accurate. Receivers do play a significant role in the Cayman Islands, although their functions and appointments are distinct from other insolvency practitioners like liquidators. A receiver is typically appointed as a temporary custodian of assets. There are different types of receivership available in the Cayman Islands, being private receivers and court appointed receiver.

1. **Private** **Appointed Receivers**

Under **Section 72 of the Registered Land Act**, a receiver is privately appointed by a secured creditor pursuant to their contractual rights under a Charge document. Under the Act, if the Chargor defaults in payment or any agreement related to the charge and the default continues for one month, the Chargee can serve a written notice to the Chargor to remedy the default. Under subsection 2, if the Chargor does not comply within three months of the date of service, with a notice served on him under subsection (1), the Chargee may appoint a receiver of the income of the charged property; or sell the charged property.

**Section 73 of the Registered Land Act** on appointment of a Receiver, the Act states that a Receiver’s appointment must be in writing, signed by the Chargee, and a copy filed with the Registrar. The Chargee can remove and appoint a new receiver at any time, following the same process of written documentation and filing with the Registrar. The Receiver acts as the agent of the Chargor, making the Chargor solely responsible for the Receiver’s actions unless otherwise stated in the Charge. Such a Receiver has the power to demand and recover income in the Chargor’s name and provide valid receipts.

1. **Court-appointed Receivers**

Under **Section 11 [1] of the Grand Court Act**, the Grand Court is vested with the power to appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so. The Court possesses and exercises similar jurisdiction within the Islands as the High Court of Justice and its Divisional Courts in England, as established by the **Senior Courts Act, 1981**, and any subsequent amendments or replacements.

Under **Section 37 [1] of the Senior Courts Act 1981**, the High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.

Court-appointed receivers are often appointed under **Order 45 Rule 1** **of the Grand Court Rules**, as a means to enforce a judgment or order for the payment of money into Court. According to **Order 30 of the Rules**, an application for the appointment of a receiver may be made by summons or motion. The receiver’s powers are set out in the court order that appoints them and such receiver can request directions from the Court at any time. Such request by the Receiver must be in writing and specify the matter for which directions are needed.

1. **Statutory Role in Segregated Portfolio Companies (SPCs)**

Receivers play a significant role in segregated portfolio companies (SPCs). Under **Section 224 of the Companies Act**, a receivership order can be made if the court is satisfied that the assets attributable to a segregated portfolio are insufficient to discharge creditors' claims and that such an order would help in orderly closing down the business and distributing assets.

Under **Section 225 of the Act**, the application for a receivership order can be made by the company, its directors, creditors, shareholders, or the Cayman Islands Monetary Authority. Upon being appointed the Receivers have the power *inter alia* to manage the segregated portfolio's business and assets, replacing the directors' powers in this context, and have the authority to seek court directions, vary, or discharge the receivership order as needed.

**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.

In the absence of a statutory prohibition on insolvent trading in the Cayman Islands, there are still mechanisms for holding directors accountable for their actions leading up to or during insolvency. Specifically, court-appointed liquidators or creditors can seek financial damages against former directors or attempt to "claw back" payments that should not have been made. Such mechanisms include: -

1. **The offence of Fraudulent Trading**

Under **Section 147 of the Companies Act**, if in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section. Upon considering such an application, the Court may declare that any persons who were knowingly parties to the carrying on of the business with intent to defraud creditors of the company are liable to make such contributions, if any, to the company’s assets as the Court thinks proper.

This provision aims to hold directors accountable for knowingly engaging in fraudulent activities that harm the company and its creditors.

1. **An application for voidable preferences**

Under **Section 145 of the Companies Act**, any conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts with a view to giving such creditor a preference over the other creditors shall be voidable upon the application of the company’s liquidator if made, incurred, taken or suffered within 6 months immediately preceding the commencement of a liquidation.

The liquidator may apply to the Grand Court to set aside such transactions, compelling the favoured creditor to return the assets or money and to prove their claim in the liquidation like any other creditor. This clawback mechanism ensures equitable treatment of all creditors and holds directors accountable for improper preferential payments.

1. **Transactions at an undervalue**

Under **Section 146 of the Companies Act**, the Act deals with transactions at an undervalue, where property is disposed of for no consideration or significantly less than its value, with the intention of defeating an obligation owed to a creditor.

These transactions are voidable upon application by the liquidator, who must prove an intent to defraud. This provision allows the liquidator to recover assets improperly disposed of, holding directors accountable for such transactions entered into at an undervalue.

1. **Obligation to file for insolvency**

Based on the Court’s decision in **Prospect Properties Limited v McNeill [1990–91 CILR 171**, the Court reiterated that one of the fiduciary duties owed by a director to his company is the duty to act in the best interest of that company. It is considered a breach of fiduciary duty as directors of an apparently insolvent company where such directors do not act for the benefit of the company, its customers or creditors but solely for personal advantage.

Even though there is no statutory obligation to file for insolvency, and the Companies Act does not prohibit wrongful trading, i.e., continuing to trade while insolvent, directors can still be held personally liable for any losses they cause to the company if they breach their fiduciary duty to act in the best interests of the company.

1. **Avoidance of property dispositions**

Under **Section 99 of the Companies Act**, when a winding up order has been made, any disposition of the company’s property and any transfer of shares or alteration in the status of the company’s members made after the commencement of the winding up is, unless the Court otherwise orders, void. Where such a disposition is made, the liquidator can apply for appropriate relief to require the repayment of the funds or the return of the asset to the Company.

Based on the foregoing, while there is no statutory prohibition on insolvent trading in the Cayman Islands, the legal framework provides several avenues for liquidators and creditors to hold directors accountable for improper actions leading up to insolvency, including seeking financial damages and clawing back improper payments.

**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)

TNB has a security over the movable assets of Punk Lizard, and can enforce its security over half of Punk Lizard's fleet as part of its loan is secured by a mortgage over the said assets. In the Cayman Islands, security over movable assets like ships and aircraft also involves registration in the respective asset registers (vessel or aircraft register). Under the mortgage agreement, TNB has can appoint a receiver to take control of, manage and even sell the secured assets to recover the loan amounts due to TNB. Additionally, TNB could seek a court-appointed receiver if there are concerns about the dissipation of assets not covered under the Security agreement.

1. What action can H&W take to protect its interests? (2 marks)

H & W should start by seeking the registration of the Arbitration award under **Order 73, Rule 34 of the Grand Court Rules**. This application is made by way of originating summons. Once the award is recognized as a local judgment, H & W can move the Court for the enforcement of the judgment under **Order 45, Rule 1 of the Grand Court Rules** which provides various enforcement mechanisms and states that a judgment or order for the payment of money, not being a judgment or order for the payment of money into Court, may be enforced by one or more of the following means, that is to say — writ of fieri facias; garnishee proceedings; a charging order; the appointment of a receiver; an order for committal; writ of sequestration; or an attachment of earnings order. They can also get preservation orders to prevent the dissipation of the assets.

1. What action can the unpaid employees take against Punk Lizard? (3 marks)

Under **Section 141 of the Companies Act** as read with **Schedule 2 of the Act**, sums due to employees as among the debts that rank in priority over other debts in the case of an insolvent company. These debts are referred to as preferential debts. The unpaid employees can claim their unpaid wages, salaries, and any other employment benefits as preferential debts in the event of Punk Lizard's liquidation.

In their position as creditors, they can petition the Grand Court for the Company to be wound up on the basis that the Company is unable to pay its debts.

1. Does the Cayman Islands Court have jurisdiction over Punk Lizard? (1.5 marks)

Under **Section 11 [1] of the Grand Court Act**, the Grand Court is vested with the power to appoint a receiver in all cases in which it appears to the Court to be just and convenient to do so. The Court possesses and exercises similar jurisdiction within the Islands as the High Court of Justice and its Divisional Courts in England, as established by the **Senior Courts Act, 1981**, and any subsequent amendments or replacements.

The Cayman Islands Court has jurisdiction over Punk Lizard as it is a company registered in the Cayman Islands. The Grand Court of the Cayman Islands has the authority to hear matters concerning the winding up and restructuring of local companies.

1. Is there a legal route via which Punk Lizard can protect itself and seek to restructure? (3 marks)

Legal Punk can consider appointing a restructuring officer under **Section 91B of the Companies Act** which states that a company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company is or is likely to become unable to pay its debts; and intends to present a compromise or arrangement to its creditors or a particular class of creditors.

Based on **Section 91G** **of the Companies Act**, Punk Lizard will enjoy a moratorium over all legal proceedings thus preventing the creditors from commencing any action against the Company. The enabling provision states that: -

*“At any time after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed; and when an order for the appointment of a restructuring officer is made, until the order appointing the restructuring officer has been discharged, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose.”*

They can also consider appointing a provisional liquidator under **Section 104 of the Companies Act**. This can assist the Company in securing a moratorium against the creditor’s claims while a compromise or scheme of arrangement with the Company’s creditors is being negotiated. This, however, may bring bad repute to the Company and damage the standing of the Company in the eyes of investors or suppliers.

1. Following on from (e) above, can the Kraken family continue play a part in running Punk Lizard during any restructuring process? (1 mark)

Based on **Section 91B (4) of the Companies Act**, a restructuring officer appointed by the Court shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company.

Based on the directions to be given by the Court, the Kraken family can continue to play a part in running Punk Lizard during the restructuring process if the court grants such orders. The existing management can retain control over the day-to-day operations of the company under the supervision of the restructuring officer.

1. What factors will the Cayman Islands court take into consideration before approving any proposed restructuring? (2.5 marks)

The Cayman Islands Court will consider several factors before approving any proposed restructuring. These include but are not limited to: -

1. **Fair Representation and Approval by Creditors and Members** – **Section 91I of the Companies Act** requires that any proposed compromise or arrangement must be approved by a majority in number representing 75% in value of the creditors or class of creditors, or members or class of members present and voting at the meeting summoned by the court.
2. Whether the proposal has been made in good faith and is fair to all parties involved.
3. The court will verify that all procedural requirements have been met, including proper notice to creditors, members, and any relevant authorities, as stipulated under **Sections 91B (5) and 91C(5) of the Companies Act**.
4. The Court will consider the benefits of the restructuring plan to ensure that it is in the best interests of the stakeholders involved.

**\* End of Assessment \***