



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 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 9 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

Select the correct answer.

Once an application for a restructuring officer is filed:

- (a) No action may be commenced against the company without leave of the court.**
- (b) No existing action may be continued against the company without permission of the provisional liquidator.**
- (c) Legal proceedings may be commenced or continued against the company without leave of the court.**
- (d) No action may be commenced against the company.**

Commented [BT1]: Correct

Question 1.2

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

- (a) Appointment of a receiver.**
- (b) Court-supervised liquidation.**
- (c) Official liquidation.**
- (d) Deed of Company Arrangement.**

Commented [BT2]: Correct

Question 1.3

Select the correct answer.

In a voluntary liquidation:

(a) The company may cease trading where it is necessary and beneficial to the liquidation.

(b) The company must cease trading except where it is necessary and beneficial to the liquidation.

Commented [BT3]: Correct

(c) The company must cease trading if it is necessary and beneficial to the liquidation.

(d) 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:

(a) A company incorporated in the Cayman Islands.

(b) A company with property located in the Cayman Islands.

(c) A company carrying on business in the Cayman Islands.

(d) Any of the above.

Commented [BT4]: Correct

Question 1.5

Select the correct answer.

In a provisional liquidation, the existing management:

(a) Continues to be in control of the company.

(b) Continues to be in control of the company subject to supervision by the court and the provisional liquidator.

(c) May continue to be in control of the company subject to supervision by the provisional liquidator and the court.

(d) Is not permitted to remain in control of the company.

Commented [BT5]: Incorrect. Answer was (c)

Question 1.6

Select the correct answer.

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

- (a) May enforce their security with leave of the court.*
- (b) May enforce their security with leave of the court provided the liquidator is on notice of the application.*
- (c) May enforce their security without leave of the court.***
- (d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.*

Commented [BT6]: Correct

Question 1.7

Select the correct answer.

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

- (a) 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.*
- (b) 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.***
- (c) 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.*
- (d) 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.*

Commented [BT7]: Correct

Question 1.8

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

(a) Sums due to company employees.

(b) Taxes due to the Cayman Islands government.

(c) Amounts due to preferred shareholders.

Commented [BT8]: Correct

(d) Sums due to depositors (if the company is a bank).

(e) Unsecured debts which are not subject to subordination agreements.

Question 1.9

Select the incorrect statement.

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

(a) The company passes a special resolution requiring it to be wound up.

(b) The company does not commence business within a year of incorporation.

(c) The company is unable to pay its debts.

(d) The board of directors decides it is "just and equitable" for the company to be wound up.

Commented [BT9]: Correct answer

(e) The company is carrying on regulated business in the Cayman Islands without a license.

Question 1.10

Select the correct answer.

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

• 50% or more representing 75% or more in value of the creditors must agree.

Commented [BT10]: Incorrect. Correct answer was (d)

• 50% or more representing more than 75% of the creditors must agree.

• More than 50% representing more than 75% of the creditors must agree.

• More than 50% representing 75% or more in value of the creditors must agree.

Commented [BT11]: 8 / 10 for Q1

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [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?

The Cayman Islands centrally maintains an ownership register dealing with real estate, ships, aircraft, motor vehicles and intellectual property. This register allows creditors to have mortgages and charges registered over assets contained therein. Generally, when a security interest is registered in the register this means that a third-party purchaser of the charged asset will be deemed to have notice of any such interest and will therefore acquire the assets subject to the secured creditor's interest. Moreover, where an interest is contained within the register the creditor is also given priority over non-registered creditors.

However, no public security register regime exists in the Cayman Islands for other types of assets and therefore creditors must conduct adequate investigations to determine whether an asset is already encumbered and, indeed, whether the creditor will have sufficient control over the asset to prevent any third-party interference. According to section 54 of the Companies Act security interests to be entered in the register of mortgages and charges of the debtor company. This register will be maintained by the company at its registered office. Where an interest is registered in the register of the company, priority is not created and the registration does not put third parties on notice of the existence of a security recorded therein.

Question 2.2 [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's powers to make orders in support of foreign insolvency proceedings are provided for in Part XVII of the Companies Act read alongside the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018.

There are no formal requirements that need to first be satisfied before the Grand Court will offer (and/or grant) assistance. There are also no automatic rights based on the centre of main interest of the debtor. What will be necessary is for the foreign representative to satisfy the Grand Court that it is appropriate for the court to exercise its discretion by granting the relief sought in the foreign representative's application. In determining whether the Grand Court should exercise its discretion in favour of the foreign representative, and thereby granting the relief sought, the Grand Court must consider the matters which will best assure an economic and expeditious administration of the debtors estate, which will be consistent with:

- *The just treatment of all holders of claims;*
- *The protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings;*

Commented [BT12]: The register is open for inspection therefore the third party is on constructive notice

Commented [BT13]: Good. 2 1/2 marks

- *The prevention of preferential or fraudulent dispositions of property in the debtor's estate;*
- *The distribution of the estate among creditors substantially in accordance with the statutory order of priority;*
- *The recognition and enforcement of security interests created by the debtor;*
- *The non-enforcement of foreign taxes, fines and penalties; and*
- **Comity.**

Commented [BT14]: 4 marks

Question 2.3 [maximum 3 marks]

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

The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgment, nor has the Cayman Islands signed the Hague Convention on the Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matters. However, the in cross-border cases, the Grand Court adopts a co-operative approach to ensure effective winding-up and the protection of the interests of its creditors wherever situated. Notwithstanding this, the Foreign Judgment Reciprocal Enforcement Act (1996 Revision) provides a (limited) statutory mechanism for the recognition and enforcement of foreign judgments. In order for the mechanism to be of use, the country from which the judgment originates must assure the substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgments (see s.3(1)). The substantial procedure of recognition and enforcement of foreign judgments is governed by Order 71 of the Grant Court Rules, which states that in order for the judgment to be enforceable it must be:

- *Final;*
- *A money judgment; and*
- *Made after the 1996 Act was extended to the relevant foreign country.*

Because of the limited nature (and application) of the Foreign Judgment Reciprocal Enforcement Act, it is also possible in the Cayman Islands to have the judgment "recognised" and enforced by issuing new actions proceedings based upon the foreign judgment as an unsatisfied debt (i.e. the common law approach). This process is governed by the Grant Court Rules. In order for the common law approach to be adopted, the following requirements must be satisfied:

- *The judgment is final;*
- *The foreign court has jurisdiction over the debtor;*
- *The foreign judgment was not obtained by fraud;*
- *The foreign judgment is not contrary to public policy of the Cayman Islands; and*
- *The foreign judgment was not obtained contrary to the rules of natural justice.*

Whether utilising the common law or the statutory mechanism a limitation period of 6 years applies, which runs from the date the judgment, or when there have been appeals, the date of the last judgment.

Commented [BT15]: 3 marks

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

Question 3.1 [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.

There are various options available to a liquidator against former directors of the company, which include powers/duties related to "avoidance of property dispositions", "voidable preference", "avoidance of dispositions made at an undervalue", "fraudulent trading" and "obligation to file for insolvency". Each of these options are dealt with in turn below.

- ***Avoidance of property dispositions*** - this is likely to occur where there has been a disposition of company property made after the deemed commencement of the winding-up and a subsequent winding-up order is made. In this case, the disposition will be void, and the Liquidator is entitled to apply for the appropriate relief to require the repayment of funds or return of the asset.
- ***Voidable Preference*** - giving a preference over other creditors means putting that creditor in a better position than it otherwise have been. In this case, the liquidator may apply to the Grand Court for an order that the creditor return the asset and prove in the liquidation for the amount its claim.
- ***Avoidance of dispositions made at an undervalue*** - A disposition at undervalue occurs where a disposition has been made where there has been no provision of consideration or at a consideration has been provided (in money or money worth) but it is significantly less than the value of the property. In these circumstances, a liquidator or a creditor can apply to have the disposition set aside. The liquidator will need to show that recipient of the company's assets had knowledge that the directors were acting in breach of their fiduciary duty and that the knowledge was that the recipient's "conscience" was so affected that it would be impermissible to allow them to retain the misappropriated asset.
- ***Fraudulent trading*** - This occurs where the company was carried on with the intent to defraud creditors or for a fraudulent purpose. Here, the liquidator may apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company's assets as the Court thinks fit.

- **Obligation to file for insolvency** - whilst there is no statutory obligation to do so, where the facts require an insolvency to be initiated director can be made personally liable to the company any losses which they cause to the company if the act in breach of their fiduciary duty to act in the best interests of the company.
- Further, where a company is in liquidation, the OL can pursue claims against the directors on behalf of the **company**.

Commented [BT16]: Good. Citation of the relevant sections of the Companies Act and some case law would have secured full marks. 7/9

Question 3.2 [maximum 6 marks]

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

Although receivers are not explicitly mentioned in the Cayman Island statutory provisions dealing specifically with insolvency (i.e. the Companies Act and Companies Winding up Rules) receivers may nonetheless be appointed. Generally, receivers would be appointed to collect money, enforce court orders for the payment of money or in respect of a particular type of Cayman Islands legal entity, namely the Segregated Portfolio Company (see part XIV of the Companies Act).

In the insolvency context, the main relevance of receivers is that receivership may offer an alternative course of action for certain creditors. Some of the main benefits of this course of action for creditors include:

- Receivers can be appointment without any court involvement pursuant to the rights in a security instrument;
- The receiver will act under the powers set out in the charge documents, which will typically include a right of sale;
- The receiver will generally realise the value of the charged asset and repay the creditor the amount of its unpaid debt; and
- The Receiver is not supervised by the court and usually owes its duties to the creditor rather than the debtor company.

Order 30 of the Grand Court Rules governs the appointment and duties of receivers generally. An application for the appointment of a receiver may be made by summons or motion (see Order 30; rule 1). A receiver may also be appointed by way of equitable execution. Where an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is just or convenient that the appointment should be made shall have regard to:

- the amount claimed by the judgment creditor,
- to the amount likely to be obtained by the receiver; and
- to the probable costs of his appointment

*may direct an inquiry on any of these matters or any other matter before making the appointment (see Order 50; rule 1). For example where a receiver has been appointed by way of equitable execution please see *Scotiabank (Cayman Islands) Limited v Treasure Island Resort (Cayman) Limited-2004 - 2005 CILR 423*].*

A judgment or order directing the appointment of a receiver may include such directions as the Court thinks fit for the giving of security by the person appointed (see Order 30; rule 2).

Commented [BT17]: Good, although answer would benefit from clearer structure (as in study guide 6.4) 4/6.

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

Vegan Patty Inc (VP) is a company registered in the Cayman Islands. It operates a fleet of party boats cross central America and the Caribbean. It was founded by the wealthy Rackham family over 40 years ago. The family continues to own and manage the business.

Between 2015 and 2019, VP had been rapidly expanding its operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to COVID-19 adversely affected its revenues.

VP has only managed to stay afloat for the past three years with the assistance of a very large loan from Blue Iguana Treasure Bank (BITB). BITB has lent VP USD 300 million (USD 180 million of which is secured by a mortgage over four of VP's largest party boats). The loan facility has now been exhausted. VP has also fallen behind on the monthly repayments to BITB.

This year, the tourism market picked up again; however, VP cannot afford to pay the ongoing costs associated with maintaining its fleet of ships (which include electricity and water costs for its huge dry dock facility, ongoing engineering and mechanical costs and also wages, pension and health insurance for its reduced team of employees) let alone find enough money to buy the vast quantities of rum it needs to keep the tourist customers suitably refreshed.

To make matters worse, VP commissioned Johnson & Boris Ltd (JoBo) to build seven more oversized party boats only a few months before the pandemic struck. VP attempted to wriggle out of the contract but, by virtue of an arbitration clause, the dispute was referred to the ICC sitting in London. Earlier this month, the ICC ruled that VP must pay damages of USD 50 million to JoBo within 45 days. VP has no prospect of being able to satisfy that award.

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

(a) What action can BITB take to protect its interests?

Since BITB has USD180 million secured by a mortgage over four of VP's largest party boats, BITB should, in the first interest, register this interest on the vessels register. By doing so, a third party purchaser(s) of the four party boats will be deemed to be on notice of such interest and will therefore acquire the party boats subject to BITB's interest.

Alternatively, and in relation to the other USD120 million, BITB could consider taking a pledge over any other assets of VP, which will be created by contract and perfected through delivery (actual or constructive) of possession of the asset to be secured by BITB. An asset may be pledged as security for a loan and in the event of a default on the loan, the lender has the right to take possession of the pledged asset and sell it.

Further alternatively, BITB could seek to enforce its security. BITB, as a secured creditor, can enforce its security without leave of the Grand Court and notwithstanding the appointment of a liquidator or restricting officer.

Commented [BT18]: 2

(b) What action can JoBo take to protect its interests?

JoBo has three options:

The arbitral award could be used (and relied upon) by JoBo to petition to wind up VP on the basis that it is unable to pay its debts.

Alternatively, JoBo could seek to have the arbitral award recognised in the Cayman Islands (and prepare to take the necessary steps to give effect to (3) below).

Further alternately, JoBo could seek to have the award executed or otherwise carried out as against VP in the Cayman Islands. Section 72 of the Arbitration Law, 2012, provides that an award made by an arbitral tribunal may, with leave of the court, be enforced in the same manner as a Cayman judgment or order to the same effect, and where leave is so given; judgment may be entered in terms of the award. JoBo would be entitled to do so as section 72(5) states that an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application to the Cayman court, shall be enforced subject to the procedural provisions of Sections 6 and 7 of the Foreign Arbitral Awards Enforcement Law (1997 Revision).

Commented [BT19]: Ok but a little confused as to sequence - 1. recognition, 2. enforcement (which could include a petition to wind up) 2 marks

(c) What action can the unpaid employees take against VP?

The unpaid employees will have no (insolvency) recovery remedies until VP enters into liquidation. As that point, the debts due by the company to an employee, whether employed in the Islands or elsewhere, in respect of (a) wages; (b) salaries and (c) gratuities and which accrued and were due the four months immediately preceding the commencement of any liquidation proceedings will be classified as preferential debts and shall be paid priority to all other debts.

Commented [BT20]: They have standing to wind up and claim as preferential creditor per s.141 - 1 mark

(d) Does the Cayman Islands Court have jurisdiction over VP?

The Grand Court has jurisdiction to make (winding-up) orders in respect of companies which are either:

- Incorporated in the Cayman Islands;
- Incorporated elsewhere but subsequently registered in the Cayman islands;
- In respect of a foreign company which (i) has property located in the Islands, (ii) is carrying on business in the Islands, (iii) the general partner of a limited partnership, (iv) is a registered overseas company.

We know that VP is incorporated in the Cayman Islands (and carries on business in the Islands) and therefore the Cayman Islands Courts will have jurisdiction.

Commented [BT21]: 1 mark

(e) Is there a legal route via which VP can protect itself and seek to restructure?

VP could seek to enter into a scheme of arrangement with BITB, which may allow V to restore liabilities. A scheme of arrangement is a court approved compromise/arrangement entered into between a company and its creditors/members or any class of them. The ability to enter into a scheme of arrangement is governed by section 86 of the Companies Act (as revised). If VP decides to follow this route (and requires time to negotiate the terms of the arrangement/compromise) it could further protect itself by making an application to place it into provisional liquidation which would result in a moratorium to protect it from BITB taking any other steps of enforcement. Alternatively, should VP require a more effective procedure, VP could apply by petition to appoint a company restructuring officers which would trigger an automatic stay

Commented [BT22]: 3

(f) Following on from (e) above, can the Rackham family continue play a part in running VP during any restructuring process?

Provided the company remains out of liquidation, management (i.e. the Rackham family) stay in control. If a restructuring officer is appointed, management (i.e. the Rackham family) may remain in control but with a level of oversight from the restructuring officer. Whether or not the Rackham family continue to play a part in running VP during a restructuring process will be largely depend on the facts at a given time.

Commented [BT23]: Yes. Whether management stays, and the powers that they continue to hold, depends on the terms of the court's order 1/2 mark

(g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?

The factors considered by the Cayman Islands court include (as per *In the Matter of Ocean Rig* [2017 (2) CILR 495 at paragraph 85 ("Ocean Rig")):

- Whether there was compliance with the convening orders and the statutory requirement of the Companies Law;
- Whether, at the scheme meeting, the class or classes of scheme creditor were fairly represented and the majority acted in a bona fide manner;
- Whether the scheme was one that an intelligent and honest scheme creditor, acting in respect of its interests, might reasonably approve, such that the court should exercise its discretion to sanction the scheme

The Court will also consider whether a 50% or more representing 75% or more in value of the creditors agreed to the arrangement / compromise and whether the scheme is fair. This follows from paragraph 87 where the court stated, quoting from Arden, Prentice and Richards (eds), Buckley on the Companies Acts, 15th ed:

"The sanction of the court is not a mere formality. Although the court has an unfettered discretion as to whether or not to sanction the scheme, it is likely to do so, as long as [the questions set out above are satisfied]...Members and creditors are normally the best judges of what is in their commercial interest and are better placed than the court to decide where their best interests lie. The test is not whether the opposing members or creditors have reasonable objections to the scheme, because a member or creditor may be equally reasonable in voting for or against the scheme. The court can sanction a scheme notwithstanding that there are members or creditors who sincerely contend that the scheme is unfair....The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting. The court will decline to sanction the scheme if the class has not been properly convened and properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme which had been unobserved when it had been approved by members or creditors, but will otherwise be slow to differ from the meeting. It is not only those matters which had not been appreciated at the time of the meetings which might lead the court to decide not to sanction the scheme, although aspects of the scheme which are perceived as defects by objectors, but which are deliberate and have been made plain, are not capable of being described as a blot on the scheme. A scheme could be said to have a 'blot' on it if it did not have the effect that the company and the members or creditors intended. The word 'blot' has been said not to have any inherent meaning and it does not limit the discretion not to sanction the scheme to technical objections that render the scheme unlawful or inappropriate"

Commented [BT24]: 2 marks

* End of Assessment *

Commented [BT25]: 11 1/2 for question 4

Commented [BT26]: TOTAL MARKS 40 / 50