



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.**
- (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.*

Commented [BT3]: Correct

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.

Commented [BT5]: Correct

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

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.

Commented [BT6]: Correct

(d) 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:

(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.

Commented [BT7]: Correct

(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.

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.**
- (d) Sums due to depositors (if the company is a bank).
- (e) Unsecured debts which are not subject to subordination agreements.

Commented [BT8]: Correct

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

Commented [BT9]: Correct

Question 1.10

Select the correct answer.

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

- (a) 50% or more representing 75% or more in value of the creditors must agree.
- (b) 50% or more representing more than 75% of the creditors must agree.
- (c) More than 50% representing more than 75% of the creditors must agree.

(d) **More than 50% representing 75% or more in value of the creditors must agree.**

Commented [BT10]: Correct

Commented [BT11]: 10/10

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 Caymans Islands has an ownership register for certain types of assets (real estate, ships, aircraft, motor vehicles and intellectual property) and mortgages and charges can be registered on the relevant register. The security provides for priority over other creditors. Additionally, third party purchasers are deemed to acquire assets subject to any securities registered.

Commented [BT12]: Good. 1.5 marks

However, for other types of assets, there is no public registry. Instead, companies are required to maintain their own register of mortgages and charges at its registered office. If the company does not update the register, this will not by itself render the security invalid.

Commented [BT13]: Good. Further information on priority and third party notice required for full marks. 2.5 marks total for this question.

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 can make orders to assist foreign insolvency bankruptcy proceedings, by virtue of Part XVII of the Companies Act. Under the Companies Act, the Grand Court may provide a range of discretionary relief. In determining whether to exercise its discretion, the Court will have regard to ensuring an economic and expeditious administration of the estate having regard to:

- *Just treatment of all claim holders;*
- *Protection of all claim holders from prejudice and inconvenience;*
- *Preventing preferential or fraudulent dispositions;*
- *Distribution to creditors in accordance with statutory priorities;*
- *Recognition of security interests;*
- *Non-enforcement of foreign taxes, fines and penalties; and*
- *Comity.*

Commented [BT14]: 3.5

Question 2.3 [maximum 3 marks]

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

The Cayman Islands have not entered into any international treaties that support the recognition or enforcement of foreign judgments. However, under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision), the Court can recognise and enforce foreign judgments. This is limited to foreign jurisdictions that provide for reciprocity of treatment for enforcement of Cayman Island judgments. Additionally, Foreign judgments may only be enforceable if they are: final; a money judgment; and made after the 1996 Act was extended to the relevant jurisdiction.

Commented [BT15]: What about the common law? 2 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.

*Claims can be made against directors for any losses caused if they breach their fiduciary duty to act in the best interests of the company. In this regard, the Court has held in *Prospect Properties v McNeill* [1990-91 CILR 171] that the directors are required to have regard to the company’s creditors when the company is insolvent. In an official liquidation, the official liquidator can take a claim against the directors for breaching this duty and the directors may become personally liable for the losses caused.*

Payments may be clawed back where they were a voidable disposition or where the transaction was a disposition at an undervalue. A voidable disposition is where the payment or disposal of property to a creditor was done in the six months prior to the commencement of liquidation when the company was unable to pay its due debts and the dominant intention of the directors was to give a preference. In this regard, a preference is effectively enabling the creditor to receive more than they would otherwise have received. If the party that received the disposition was a related party, the transaction will be deemed to have been a preference.

A disposition at an undervalue occurs when property is disposed of below the value of the property or for no consideration. It must have been disposed of with the intent of wilfully defeating an obligation owed to a creditor.

A voidable disposition application may be made by a liquidator, whereas the disposition at an undervalue may be made by the liquidator or a creditor.

Commented [BT16]: Good. Citation of the relevant sections of the Companies Act and some case law would have secured more marks. 6/9

Question 3.2 [maximum 6 marks]

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

In the Cayman Islands, secured creditors can continue to enforce their security without the leave of the court and the without reference to the liquidator. The secured creditor can elect to enforce their security through the appointment of a receiver, pursuant to the rights provided for in the security agreement. Therefore, in an insolvency scenario, a receiver may have a large role to play depending on the nature of the assets subject to security interests. The receiver's role is a more limited role based on acting for the benefit of the creditor that appoints them and they will be acting in accordance with the security agreement and not under the supervision of the Court, unlike order insolvency processes.

However, generally speaking receivership is not an option for the general body of creditors or for the company to utilise when it is insolvent. The exception to this is when dealing with a segregated portfolio company (whereby one entity ring-fences certain assets and liabilities within the entity). Where the assets for one of the ring-fenced portfolios will not be sufficient to meet creditor claims, a receiver may be appointed by the Grand Court. Therefore, where the insolvency scenario involves a segregated portfolio company, a receiver may have a role to play in a Cayman Islands insolvency scenario.

Commented [BT17]: Good but lacking specifics 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?**
- (b) What action can JoBo take to protect its interests?**
- (c) What action can the unpaid employees take against VP?**
- (d) Does the Cayman Islands Court have jurisdiction over VP?**
- (e) Is there a legal route via which VP can protect itself and seek to restructure?**

- (f) Following on from (e) above, can the Rackham family continue play a part in running VP during any restructuring process?**
- (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?**

BITB has a mortgage over four of VP's largest party boats and is entitled to enforce its security and could appoint a receiver to recover and realise these boats. However, this security only extends to US\$180m out of the US\$300m of lending2.

The employees and JoBo could seek to protect their interests via the appointment of an official liquidator, whose role is to realise and distribute the assets of the company to the creditors. While waiting for the winding-up petition to be heard, the employees and JoBo could apply to the Grand Court for the appointment of a provisional liquidator, if they consider a provisional liquidator is necessary to preserve and protect VP's assets.

Under s91 of the Companies Act, the Grand Court has jurisdiction over VP as it registered in the Cayman Islands. Additionally it has property located in the Cayman Islands and is carrying on business in the islands.

In order to restructure VP, the company could seek to appoint a restructuring officer, via a petition to the Grand Court on the basis VP is or is likely to become unable to pay its debts, and it intends to present a compromise or arrangement to its creditors. The

Commented [BT18]: 2

Commented [BT19]: The key point here is that they are preferential creditors

Commented [BT20]: In relation to JoBO, question calls for reference to NY convention, FAAEA, recognition, enforcement, reference to Companies Act etc

Commented [BT21]: Correct. 1.5.

directors may present the petition to the Grand Court. A moratorium is triggered upon the filing of the petition. If appointed, the restructuring officer can undertake a work-out with creditors, or can look to use a scheme of arrangement to restructure VP's liabilities. The benefit of the scheme of arrangement is that dissenting creditors within a class of creditors can be crammed down. This requires a majority in number representing 75% of value of that class of creditors to approve. If the intent of the scheme was to cram down JoBo, this may prove challenging as they have US\$50m of debt, with BITB holding US\$120m (noting BITB has a secured claim of US\$180m which would likely fall under a different class of creditors).

Commented [BT22]: 2

The Rackman family may still continue to have a role to play in the management of VP post the appointment of a restructuring officer. The Grand Court will determine which powers remain with the directors (if any) and which powers will be vested in the restructuring officer. The application to appoint the restructuring officer will need to address what powers should remain with the Rackman family during the restructuring process.

Commented [BT23]: 1

The Grand Court is involved with approving a scheme of arrangement in two ways. Firstly, to make an order that a meeting of creditors is convened to approve the scheme. The Court will look at the class composition, jurisdictional issues, and the documentation and notice that will be served to creditors. Secondly, the Grand Court needs to sanction the scheme if approved by creditors. In order to sanction the scheme, the Court will look at:

- Compliance with the court orders convening the scheme meeting;
- Whether the majority fairly represent the class; and
- Whether the arrangement is one that an intelligent, honest member of the class of creditors as convened and acting in their own interest, might reasonably approve it. The Court will have regard to what the alternatives are to the scheme when evaluating this.

Commented [BT24]: 2.5

Commented [BT25]: Good in parts but rushed in others. 9/15

Commented [BT26R25]: 37 OUT OF 50

* End of Assessment *