



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]: Incorrect. Answer was (d)

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]: 9/10

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?**

*If security is granted in respect of loans against real estate, ships, aircraft, vehicles or intellectual property the creditor may register its security on the centrally maintained security registers. In doing so any third-party purchaser will be deemed to have notice of their interest. Registration also gives the creditor priority over unregistered creditors.*

*If the asset is not listed above, the secured interest must be registered on the debtor's own security register that must be maintained at their registered office. Registration does not guarantee priority but the lack of updating the register will not automatically invalidate any charges not registered.*

Commented [BT12]: Good albeit a little too concise. 2.5 marks.

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?**

*Given the Cayman Islands has not implemented the UNCITRAL Model Law nor is it a member of the EU, there are no threshold tests for the grant of assistance, nor are there automatic rights based upon the COMI of the debtor.*

*Instead, foreign representatives must satisfy the Grand Court that it is appropriate for the Court to exercise its discretion by granting the relief requested. The Grand Court's powers in this regard are provided for in Part XVII of the Companies Act.*

*In deciding whether to exercise its discretion, the Court will be guided by what will best assure an 'economic and expeditious' administration of the debtor's estate. As an example the Court will have regard to:*

- *The just treatment of all claims holders, wherever they are domiciled;*
- *The prevention of preferential or fraudulent dispositions of the debtor's property;*
- *The recognition and enforcement of security interests created by the debtor; and*
- *Mutual recognition and co-operation concerning legal decisions.*

Commented [BT13]: 3 marks. More detail needed e.g section 242

Question 2.3 [maximum 3 marks]



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

*The Grand Court adopts a co-operative approach to ensure the protection of creditors wherever they are situated. However the Cayman Islands has not entered into any Treaties for reciprocal recognition of foreign judgments. In addition the Cayman Islands is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. In Caymanian domestic law, the Foreign Judgments Reciprocal Enforcement Act 1996 does provide a statutory route for recognition but only where the originating country assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands judgments. To date this courtesy has only been extended to the Superior Courts of Australia.*

*Given the above limitations, the Common Law route for recognition is more widely used. This is achieved by commencing a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation. These actions are governed by the Grand Court Rules.*

*The mandatory requirements in this regard are:*

- *The judgment must be final;*
- *The foreign court had 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 in a manner contrary to the rules of natural justice.*

*A mandatory 6 year limitation period applies for common law enforcement and actions under the 1996 law. The limitation period runs from the date of the judgment, or the date of the last judgment where there have been appeals.*

Commented [BT14]: 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.***

*Court appointed liquidators can pursue claims against directors on behalf of the company for breaches of their fiduciary duty. This is notwithstanding the absence of a prohibition on wrongful or insolvent trading.*

*Directors can be made liable to the company for any losses caused by them that the company must suffer if their actions can be shown to be contrary to the best interests of the company and therefore not in accordance with their fiduciary duties. If found to be at fault, the directors could be liable for a 'claw back' of funds misappropriated or required to repay funds lost through their actions.*

*This concept of acting in accordance with fiduciary duties was outlined in Prospect Properties v McNeill [1990-91 CILR 171] where the Grand Court held that where a company is insolvent, the directors' duty to act in the best interests of the company requires the to have regard to the interests of its creditors. Naturally, the creditors' best interests are to receive proper payment and there is a dual interest for the company not to be prejudiced by being placed into a position where it is unable to pay and therefore insolvent.*

*More specifically, section 147 of the Companies Act outlines the offence of fraudulent trading. This provision states that if the business of a company was carried on with the intent to defraud creditors, or for any fraudulent purpose, a liquidator may apply to the Court for an order requiring any persons who were knowingly parties to such conduct to make contributions to the company's assets. If this were to be proven the court could require restitutionary measures from any connected party - this could be directors or even a connected creditor if they were in some way complicit in the fraudulent trading.*

*Sections 99, 145 and 146 of the Companies Act outline further actions open to the liquidator, namely 'Avoidance of Property Dispositions', 'Voidable Preferences' and 'Avoidance of Dispositions made at an Undervalue'.*

*All avoidance actions, if successful would result in the relevant party, which could be a director or even a creditor, having to subject themselves to a potential clawback from the liquidator - usually of the asset itself or the financial equivalent if not available.*

*Section 99 deals with avoidance of property distributions. In this scenario any dispositions made by the directors after the deemed commencement of the winding up (which is back dated to the date of the application) are voidable unless validated post-petition by the Court. In an insolvent situation the court is unlikely to validate a post-petition disposal unless it can be demonstrated that there is a benefit to the company and the creditors as a whole.*

*Section 145 deals with voidable preferences. In this scenario any payment or disposal of property is a voidable preference if:*

- It occurs in the 6 months before the deemed commencement of the liquidation and the company was unable to pay its debts at the time; and*

- *The dominant intention of the company's directors was to give the applicable creditor preference over others.*

*Giving a creditor (including directors who are also creditors) a preference means putting them in a better position than they would otherwise have been. This allegation can be rebutted by the creditor placing evidence before the court that shows, for example, the payment or disposition was made to ensure essential services were maintained. It should be noted that any disposition to a 'related party' such as a director will be automatically deemed to have been undertaken with a view to preferring that party. If successful the liquidator can petition the court for the return of the asset (or funds).*

*Finally, section 146 deals with the avoidance of dispositions at an undervalue. In this scenario the liquidator can petition for a transaction to be avoided by the court if the asset was disposed of at an undervalue and this was done with the intention to wilfully defraud. Undervalue is defined as the disposal of an asset for no consideration or consideration which in money or money's worth is materially less than its value. An application of this nature must be brought within 6 years of the disposal by the liquidator or the affected creditor who must prove the intent to defraud.*

Commented [BT15]: 9/9

**Question 3.2 [maximum 6 marks]**

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

*There is scope to disagree with this statement. Whilst the role of a receiver may be limited, the role they do play can have a positive and expeditious impact on an insolvency process.*

*Receivers do not fall under the purview of the usual statutes that deal with insolvency, rather their use is governed by the Grand Court Rules and by statute in relation to a specific company type - Segregated Portfolio Companies.*

*The most common appointment type for a Receiver in an insolvency context is a direct appointment by a creditor pursuant to rights contained in their security instrument. Receivers appointed in this manner can be appointed without any court involvement (which keeps costs low) and are appointed to perform a specific purpose related to the asset that was the subject of the security - usually to recover, sell and return funds to the secured creditor. The Receiver's appointment will be governed by the terms of the security instrument and they will usually owe their duties to that creditor.*

*Although this role is specific and limited, when used correctly, it can result in a swift, cost effective recovery of funds for a secured creditor. From the debtor company's perspective, if they are insolvent, another process will need to be run to deal with other creditors (or the unsecured element of the secured creditor's claim). But the swift process to appoint a Receiver may also mitigate the risk of unlawful dispositions by the debtor company which is in the interests of the secured creditor.*

*There is a statutory process for the appointment of a Receiver over a Segregated Portfolio Company (SPC). SPCs are entitled to create separate portfolios under the company name to hold specific asset classes. Receivers can be appointed by the Court over a specific portfolio within an SPC if it can be shown that the portfolio has insufficient assets to meet its liabilities. The Receiver's role here is akin to a liquidator but, unlike a traditional liquidation, the Receiver's remit will be limited to the specific portfolio in question, not the assets of other portfolios or the company itself.*

*If appointed by the Court the Receiver will be responsible for:*

- *The orderly wind down of the portfolio; and*
- *The distribution of the portfolio assets to those entitled to them.*

*In light of the above two different styles of appointment, it is not accurate to say that Receivers have no role in a Caymanian insolvency.*

**Commented [BT16]:** Good. Reference to statutory provisions would have secured full marks. 5/6

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?**

*BITB's most obvious course of action would be to appoint a Receiver to recover and sell VP's boats over which it has been granted security. BITB's ability to do this and the terms under which a Receiver may be appointed will be governed by the terms laid out in the security document. This would (hopefully) protect 180m of BITB's 300m potential losses. Given the security was granted over ships the secured interest should be registered on the centrally maintained security register in the Cayman Islands. The remaining sum due would amount to an unsecured claim.*

*To protect their interests vis a vis their unsecured claim, BITB could apply to the Grand Court for the appointment of a provisional liquidator (section 104 of the Companies Act). If a PL is appointed a statutory moratorium will come into force which will protect the company's assets until a formal liquidator appointment can be made (pursuant to section 97). The appointment of a PL would therefore protect the company's remaining assets from disposal especially in light of another large creditor position.*

Commented [BT17]: 3

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

*Similarly to BITB, JoBo could look to appoint a PL as described above. Or, JoBo could look to petition the Court to wind-up VP straight away, especially in light of the fact that it does not appear that VP is likely to return to solvency.*

*In making the application for an official liquidation, the petitioning party must be the company, a creditor, a shareholder or CIMA. JoBo prima facie satisfies this requirement as a creditor, however their right to present the petition will be subject to any contractually binding non-petition clauses. This may be relevant given there is an arbitration clause in the contract. This clause may detail initial steps that must be taken before the debt can be considered to be recoverable by action to wind up VP.*

*If this is not an issue, JoBo could petition to wind up VP on the basis that it is unable to pay its debts. VP will be deemed to be unable to pay its debts if:*

- *A creditor to whom the company owes a sum exceeding KYD 100 has served a demand on the company and 21 days have passed without payment; or*
- *It is proved to the satisfaction of the court that the company is unable to pay its debts.*

JoBo could therefore serve a demand on VP and wait the required 21 days. Or JoBo could seek to lay evidence before the court that VP is unable to pay its debts. In the circumstances this will be judged on a cash flow basis only (there is no balance sheet test in Cayman). On the facts, it is likely that JoBo would be successful.

Commented [BT18]: Good but missing law on recognition and enforcement of arbitration awards 2

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

Unpaid employees will have the above actions open to them to petition for the winding up of the company by way of an official liquidation or to appoint a PL as creditors of the company.

Once the company is in liquidation, the unpaid employee claims will rank as preferential claims. Per section 141 of the Companies Act this debt would be paid in priority to all others.

Commented [BT19]: 1.5

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

Yes, VP is a company registered in the Cayman Islands and as such it is under the Grand Court's jurisdiction.

Commented [BT20]: 1

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

Yes, on 30 August 2022 the Cayman Islands introduced new legislation (Part V, section 91A-J) that created the new concept of the 'restructuring officer'.

VP could present a petition to the Grand Court for the appointment of an RO on the grounds that:

- It is or is likely to become unable to pay its debts; and
- It intends to present a compromise or arrangement to its creditors.

VP's directors could present this petition without a shareholder resolution and in the absence of express permission to do so in the company's articles.

A moratorium will come into effect automatically upon the filing of the petition and this moratorium will have extraterritorial effect.

Commented [BT21]: Yes, could also enhance answer with reference to scheme of arrangement and PL but good - 2

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

If an RO is appointed, the Rackham family may continue to play a part in the running of VP during the process but their input will be subject to the RO's oversight and will depend on whether it is appropriate for them to do so on the facts.

Commented [BT22]: 1

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

*The Grand Court must be satisfied that any proposed arrangement (having regard to the alternatives) is such that an intelligent honest member of the creditor class concerned, acting by their own interest, might reasonably approve the proposed restructuring.*

**Commented [BT23]:** Yes. Could also have referenced convening orders, majority fairly representing class, with reference to statute or case law 1 mark

**Commented [BT24]:** 11.5

\* End of Assessment \*

**Commented [BT25]:** TOTAL MARKS 43 OUT OF 50