



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. Correct 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.

Commented [BT5]: Incorrect. Correct answer was (c)

(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.

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

Commented [BT7]: Correct

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]: Incorrect. Answer was (d)

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]: 7/10

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 Cayman Islands has registers for ownerships that are centrally maintained. These are for real estate, ships, aircraft, motor vehicles and intellectual property. There is no public security registration in the Cayman Islands for other types of assets.

Creditors in the Cayman Islands are not treated differently based on whether they are based in the Cayman Islands or elsewhere. They are creditor friendly. Creditors must investigate that their asset and ensure it is already encumbered and that it has sufficient control on the asset to prevent a third party purchasing it.

Registration means that the purchaser of the asset will be deemed to have notice of any interest and will acquire the asset subject to the secured creditors interest, this gives them priority over the non-registered creditors.

Under S54 of Companies Act, all security interests must be entered in the Mortgages and charges, and they must be maintained by the company at the registered office. Failure to update the schedule does not validate any security interests not recorded. Registering a security interest does not create priority. Laws of the priority and perfection of security interests will be determined by the location of the assets.

The registers are open for inspection by companies and creditors and allows third parties to see the records and a lender would be advised to update the register.

Commented [BT12]: Good. 3 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?

A foreign bankruptcy proceeding includes proceedings for reorganising and rehabilitation of the insolvent debtor. The Cayman Islands has a fragmented insolvency system, for corporate insolvency, it is regulated by The Foreign Bankruptcy Proceedings (International Cooperation Rules 2018). The foreign representative is the trustee, liquidator or other official appointed in respect of the debtor.

Cayman Islands is creditor friendly, and it takes a universalist approach to cross border issues.

The grand court is the court of most relevance to Insolvency Practitioners, it is superior court of records and has equivalent powers to High Court of England and Wales.

The Grand Courts powers are in Part XVII of the companies Act, Sections 240-242. Cayman Islands has not implemented the UNCITRAL Model of law. There is no legislation between the courts for the protocols but there is law on the protocols between officeholders and this must be approved by the Grand Court.

There are criteria for when the courts discretion will be exercised, they are guided by matters which will best assure an economic and expeditious administration of the estate:

- *The just treatment of the holder of claims*
- *The protection of claim holders*
- *The prevention of preferential or fraudulent dispositions*
- *The distribution of the estate among the creditors in accordance with the order of priority*
- *The recognition and enforcement of security interests*
- *The non enforcement of foreign tax, fines and penalty*
- *Comity*

On application for the foreign representative, the court makes the following orders of ancillary relief:

- *Recognising the right of the foreign rep to act in the islands on behalf of the debtor.*
- *Enjoining the commencement and staying of the legal proceedings against the debtor.*
- *Staying the enforcement of judgments against the debtor.*
- *Requiring the persons possessions of information relating to the business to be examined.*
- *Order the hand over to a foreign representative of any property belonging to the debtor.*

Commented [BT13]: 3.5 marks

Question 2.3 [maximum 3 marks]

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

The Grand Cayman adopts a cooperative approach for the winding up and the protection of creditors interests.

The Foreign Judgements Reciprocal Enforcement Act (1996 Revision), provides a statutory for recognition and enforcement of foreign judgements but this is only for where the country from which the judgement originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgements. This procedure is governed by Order 71 of the Grand Court Rules.

To be enforceable the foreign judgements must be:

- *Final judgement*
- *Money Judgement*
- *Made after 1996 Act*

Cayman Islands uses Common Law and due to the limited application of the 1996 Act, the enforcement is achieved by a new action in the Cayman Islands which is based on the foreign judgement as an unsatisfied debt or other obligation. This is conducted under the regular procedural regime for litigation in the Cayman Islands. Money and non-money judgements are enforceable at common law.

Therefore, the mandatory requirements for the enforcement of a foreign judgement at common law are:

- *Final judgement.*
- *Foreign court has jurisdiction over the debtor.*
- *Must not be obtained by fraud.*
- *Must not be contrary to public policy.*
- *Must not be obtained contrary to the rules of natural justice.*

Once these requirements are met, the domestic enforcement remedies are available.

Under both the common law and the 1996 Act there is a 6-year limitation period. This is from date of judgement to the date of the last judgement.

There are no international treaties that the Cayman Islands has entered into for reciprocal recognition or enforcement of foreign judgements.

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.

Directors are expected to act in the best interests of the company. This is a part of the Common Law.

There is no statutory obligation to file for insolvency and the companies act does not contain a prohibition on wrongful trading, but the directors can be held personally liable for any losses to the company which they caused to the company. This is if the directors acted in breach of their fiduciary duty which is to act in the best interests of the business.

When a company is in Official Liquidation, if there was breach of fiduciary duty, the Liquidators can pursue claims against the directors on behalf of the company.

To act in the best interest of the company, means to also act in the best interest of the creditors being paid and it is the interest of the company to be safeguarded against being put in the position that they are not able to pay the creditors.

Section 99 Companies Act- Dispositions of property post commencement.

This section 99 is used when a petition is filled. Any dispositions of a company made after the commencement of the winding up will be void if a winding up order is subsequently made. The commencement date is the date on which the petition is filed.

The liquidators can apply for relief to require repayment of the funds and return of the assets. And the Court has the power to validate post-petition grants of security. The court will validate such arrangements if the company is clearly solvent, and that the director is being honest and intelligent.

When no petition is filled, then section 99 does not assist, and the following clawback rules could be used against the directors:

Section 145 Companies Act - Voidable Preference.

The is a payment or disposal of property to a creditor that occurred in 6 months before the commencement of the liquidation and was unable to pay its debts. And the intention of the directors was to give preference to certain creditors over the others.

By paying a creditor when they are unable to pay debts, results in unfair preference of creditors and put that creditor in a better position than they would have been otherwise. If a payment was essential and made in the best interest of the business, these payments to creditors may not be seen as voidable preferences with sufficient proof of the dominant intention.

Section 146 Companies Act - Avoidance of dispositions made at undervalue.

When a transaction occurs where it is disposed at an undervalue and with intention to wilfully defeat an obligation to a creditor. The burden of proof is

with the creditors, or the liquidators and this application must be submitted within 6 years of the disposal.

Section 147 Companies Act - Fraudulent Trading.

This is where the business of the company was carried out with the intent to defraud the creditors or any other fraudulent purpose. The liquidator can apply for an order for the parties to make contributions to the company's assets.

Commented [BT15]: 8/9. Reference to case law would have secured full marks.

Question 3.2 [maximum 6 marks]

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

Receivers can be appointed but are not mentioned in the statutory provisions for insolvency (the Companies Act and the Companies Winding up Rules). The Grand Court Rules contemplates that receivers may be appointed by the court for the purposes of collecting money and carrying out other acts.

The orders that are applicable are:

- *Order 30 which governs the appointment and duties of the receivers.*
- *Order 45 which states that receivers may be appointed to enforce court orders for the payment of money.*
- *Order 51 which provides for the appointment of the receivers by way of equitable execution.*

Receivers in insolvency is that receiverships can be an alternate course of action for creditors. They can be appointed without the court involved. The duties of the receiver are with the creditor and not with the debtor company. The receiver will act under the powers of the charge document which will most likely have a right of sale. The receiver will then realise the value of the charged asset and repay the creditor.

Another use of Receiverships is for Segregated Portfolio Companies (SPC) are a Cayman Islands Legal entity that receiverships are specifically provided for by the statute. An SPC is a regulated company which remains a single entity, but which is permitted to create separate portfolios for the allocation of different assets. Of which then each portfolio is ring fenced from other portfolios which are caused Segregated Portfolios (SP). Section 216 of the Companies Act.

If determined by the grand court that the SPC's assets of the SP are likely to be insufficient to discharge claims of the creditors, then it may make a receivership order. The role is analogous to a liquidator. When under the receivership order, the receiver relieves the directors of their functions and powers of the SP. Which is in Companies act section 224-226.

A receivership order must direct the business and assets of a SP must be managed by a receiver for the purpose of:

- **Orderly closing down of the business**
- **The distribution of the SP assets**

The receivership order may not be made if the SP company is in the process of being wound up and shall cease to be of effect upon commencing of the winding up of the SPC without prejudice to prior acts of receiver. Once the application is made, no suit, action or other proceeding may be instituted against the SP except by leave of the court.

Therefore, there is a role for receivers to play in insolvency proceedings.

Commented [BT16]: 6/6

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?**

Advise for the below queries:

a. Actions to protect its interests- BITB

BITB is seen as a secured creditor and has security over the loan. They are entitled to enforce its security notwithstanding that a RO has been appointed. The creditor may enforce without the leave of the grand court.

Any portion of the debt, which is more than the security, could be seen as unsecured.

Commented [BT17]: 1.5

b. Actions to protect its interests- JoBo

When VP enters in a restructuring agreement and an RO is allocated. A moratorium is automatically triggered upon the filling of the petition. This means that no suit or action of any other proceeding may be initiated or proceeded with or without leave of the court. This includes domestic or foreign proceedings. Therefore, JOBO dispute claim will be limited by the moratorium triggered. The moratorium has extraterritorial effect.

Commented [BT18]: This question was about recognition and enforcement of arbitral awards 1

c. Actions unpaid employees can take against VP

These are seen as priority creditors that are paid in priority to all other debts. This is for services rendered to the debtor for 4 months preceding the date of the provisional order. These debts rank equally with public taxes and must be paid in full unless the property is bankrupt and insufficient to meet them.

*Any employee payments which are seen as unsecured creditors have the right to file a winding up petition in respect of the debt and will be placed with the other unsecured debts **rankings**.*

Commented [BT19]: Yes, preferential creditors, s.141 - 1 mark

d. Jurisdiction

The grand court has jurisdiction to make orders if they are incorporated in the Cayman Islands or if they were incorporated elsewhere but are registered in the Cayman Islands.

*From our knowledge, VP is registered in the Cayman Islands and therefore Cayman Islands Courts have Jurisdiction over **VP**.*

Commented [BT20]: Yes, s.91 - 1 mark

e. Legal route for VP to protect itself and restructure.

If VP is seen to be likely to become unable to pay its debts and intends to present a compromise to its creditors. Which seems to be the case as they are not able to satisfy the dispute with JOBO and cannot afford to pay the ongoing costs and maintenance of the entity.

The entity can apply by petition to appoint a restructuring officer. This then triggers an automatic stay. This is called a moratorium which is automatically triggered. This means that it allows VP to have breathing room which it determines how to restructure the entity. It stops any suits, actions, or any other proceedings against them. This includes domestic or foreign. This is with or without the leave of the court and therefore this will protect VP from JOBO dispute. A moratorium has an extraterritorial effect.

Unfortunately, this does not apply to creditors that are secured. They are entitled to enforce security without leave of the court and without reference to the restructuring officer. Therefore, BITB would have right over the USD180 million which is the 4 largest boats. Based on the compromises and restructuring plans and agreements will decide what happens going forward. The amount above the secured portion will be seen as an unsecured creditor and is not preferential.

*However, there is hope that through restructuring and compromise, the entity may be able to pick itself up due to the tourism market being back **up**.*

Commented [BT21]: Yes, s.91 A-J. 2 1/2 marks.

f. Running of VP during restructuring process

*Based on the grand court's decision, they will determine which powers will remain with the directors and which will be vested in the **RO**. If the company remains out of liquidation, the management stay in control under the RO supervision, but each case will be fact specific.*

Commented [BT22]: 1

g. Factors the court will take into consideration before approving restructuring.

This method is to provide the debtor with breathing space. To approve a restructuring, the entity must present a petition to the Grand Courts to appoint an RO, this must include reason to believe that:

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

The grand court will assess the restructuring plan and will not approve the plan unless they are satisfied that it is fair, and all conditions applied to.

Commented [BT23]: Question calls for reference to factors such as the intelligent and honest member etc - 1 mark

Commented [BT24]: 9

*** End of Assessment ***

Commented [BT25]: 39.5 OUT OF 50