



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.

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.**
- (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

(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:

(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?

Registration of a security interest means that any subsequent purchaser of the charged asset is considered to be aware of the interest and would consequently acquire the asset subject to the rights of the secured creditor. This process also allows the secured creditor to take priority over creditors who have not registered.

The Cayman Islands does have ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property. However, there is no public registration system for other asset types. As such, a creditor needs to undertake proper due diligence to ascertain whether an asset is already subject to any charge and to ensure it has ample control over an asset to stop its sale to another party. A prudent step for any lender would be to scrutinize the debtor company's register of mortgages and charges.

The Companies Act's s.54 mandates the inclusion of security interests in the debtor company's register of mortgages and charges. This register should be maintained at the company's registered office in the Cayman Islands. In reality, companies may not always fulfil this requirement. However, a company's failure to update the register of mortgages and charges does not automatically invalidate unrecorded security interests.

While recording a security interest in the company's register of mortgages and charges does not grant priority, it does alert third parties to the existence of a security registered therein as it is accessible to any company member or creditor. Hence, when providing a loan to the company, lenders should insist on updating the register.

Lastly, it's important to note that under Cayman Islands' conflict of laws rules, the law that determines the priority and perfection of security interests depends on the asset's location.

Commented [BT12]: 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?

The term "foreign bankruptcy proceedings" encapsulates proceedings designed for reorganising or rehabilitating an insolvent debtor, as detailed in s.240 of the Companies Act.

The Grand Court of the Cayman Islands can provide various forms of ancillary relief under s.240 of the Companies Act. These include acknowledging the right of a foreign representative to act on behalf of a debtor within the Islands, imposing injunctions to halt the initiation or continuation of legal proceedings against a debtor, and staying the enforcement of any judgment against a debtor. Additionally, the court can mandate an individual in possession of information related to a debtor's business or affairs to submit to examination and present documents to the debtor's foreign representative. The court can also direct that any property owned by the debtor be relinquished to a foreign representative.

When deciding to grant these ancillary orders, the Grand Court operates with discretion, guided by factors that would most effectively ensure a swift and cost-effective administration of the debtor's estate. This is done in harmony with principles such as the equitable treatment of all claim holders, regardless of domicile, adhering to established natural justice norms. Additionally, the court seeks to protect claim holders in the Cayman Islands from undue inconvenience and prejudice in processing claims in foreign proceedings.

Further considerations include averting preferential or fraudulent transfers of property in the debtor's estate, and ensuring the distribution of the estate among creditors largely aligns with the statutory order of priority. The court also recognises and enforces security interests established by the debtor and refrains from enforcing foreign taxes, fines, and penalties. Lastly, the court respects comity, the principle of mutual acknowledgement and cooperation regarding legal decisions.

Question 2.3 [maximum 3 marks]

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

The Grand Court of the Cayman Islands adheres to a collaborative approach in cross-border cases, focusing on achieving efficient liquidation and safeguarding the interests of creditors, irrespective of their locations.

Despite not being part of any international treaties for the reciprocal acknowledgement or enforcement of foreign judgments, the Cayman Islands does recognise the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is because, as a British Overseas Territory, the UK can extend its ratified treaties to the Cayman Islands through an Order in Council. However, the Cayman Islands has not signed the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) offers a legislative framework for recognising and enforcing foreign judgments. However, it applies only when the originating country assures significant reciprocity concerning the enforcement of Cayman Islands Judgments (Foreign Judgments Reciprocal Enforcement Act (1996 Revision), s 3(1)). Presently, this Act has been extended solely to judgments from the Superior Courts of Australia and is governed by O.71 of the Grand Court Rules (GCR). For a foreign judgment to be enforceable, it must be final, be a money judgment, and made after the 1996 Act was extended to the relevant foreign country.

At common law, the restricted application of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision), means that foreign judgments' enforcement typically necessitates initiating a new lawsuit in the Cayman Islands, citing the foreign judgment as an unsatisfied debt or other obligation, by way of the normal GCR procedural regime.

Commented [BT13]: More detail in respect of section 242 required for more marks. 2.5 marks.

Both money and non-money judgments, including declaratory judgments, can be enforced at common law. The key case is *Bandone v Sol Properties* 2008 CILR 301, which confirmed that *in personam* judgments may be recognised and enforced through equitable remedies or, if required, under the principle of comity. The Court will have regard to the principles of fairness, mutuality and public policy. The essential criteria for a foreign judgment's enforcement at common law include: the judgment being final, the foreign court having jurisdiction over the debtor, the judgment not being fraudulently obtained, and it not contradicting the Cayman Islands' public policy or natural justice rules.

Upon securing a local judgment, a full array of domestic enforcement remedies, such as the appointment of receivers under O.45 of the Grand Court Rules, becomes accessible, including appointing receivers per O.45 GCR.

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.

The Companies Act does not require a statutory obligation to file for insolvency, nor does it include a ban on wrongful trading, i.e. continuing to trade while insolvent. Directors, however, can be held personally liable for losses they cause to the company by breaching their fiduciary duty to act in the company's best interests. In *Prospect Properties v McNeill* [1990-91 CILR 171], the Grand Court ruled that when a company is insolvent, directors must act in the company's best interests, which necessitates considering the creditors' interests. The creditors have an interest in being paid, and it is in the company's interest to avoid being put in a position where it cannot pay. When a company is officially liquidated, the liquidator can initiate claims against the directors in the company's name for breaching their fiduciary duty.

Under s.145 of the Companies Act, a transaction can be classified as a voidable preference if it involves the payment or property disposal to a creditor. Two conditions must be satisfied: the transaction must have taken place within the six months prior to the company's liquidation, and when the company was insolvent, and the directors must have intended to give that creditor preference over others.

In re Weaving Macro Fixed Income Fund Ltd (in Liquidation) was instrumental in determining the criteria for identifying voidable preferences per s.145(1) in both the Cayman Islands Court of Appeal (2016 (2) CILR 514) and Judicial Committee of the Privy Council ([2019 (2) CILR 245]). The term "giving a preference" refers to putting a creditor in a superior position than they would have been otherwise (Weaving [2019] UKPC 36). However, if the primary motive behind making the payment or

granting the security was a different purpose (like making a good faith payment to a crucial service provider), it might not be labelled a voidable transaction even though it may indirectly favour the concerned creditor. The court will assess intent on the available evidence.

Dispositions made to a 'related party' of the company (i.e. who can control or significantly influence the company) are inferred to be done with a preference in view (Companies Act, ss.145 (2) and (3)). If the liquidator can prove that a disposition is a preference, it can be set aside. The liquidator can then request the Grand Court to order the creditor to return the asset and provide proof in the liquidation for their claim's amount.

s.146 of the Companies Act provides for transactions to be voidable if property has been disposed of at a reduced value with fraudulent intent / wilfully defeating an obligation to a creditor. 'Undervalue' means the provision of no consideration or a consideration worth significantly less than the property. The burden of proof to establish fraudulent intent is with the creditor or liquidator seeking to set aside the disposition. The application must be filed within six years from the disposal date.

Fraudulent trading is addressed in s.147 of the Companies Act. If the company's business was run with fraudulent intentions or to defraud creditors, the liquidator may seek a court order asking any person who was knowingly involved in such actions to contribute to the company's assets as deemed fit by the court.

Commented [BT15]: 9/9

Question 3.2 [maximum 6 marks]

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

The statement that receivers have no role to play in Cayman Islands insolvency scenarios is not entirely accurate. While they are not directly referenced within the statutory insolvency provisions, specifically the Companies Act and Companies Winding Up Rules, the Grand Court Rules (GCR) acknowledge the appointment of receivers. Receivers may be designated by the court to collect money, such as rents, or execute certain acts, including contracts or document titles, as outlined in Order 30 GCR.

The enforcement of court orders for money payment can also result in the appointment of receivers, as indicated by Order 45 GCR. Additionally, Order 51 GCR stipulates the appointment of receivers through equitable execution, deriving from Section 11(1) of the Grand Court Law in concert with Section 37(1) of the Senior Courts Act 1981 (England), both permitting the appointment of receivers whenever justice and convenience necessitate it. Such appointments have been exemplified in cases like Scotiabank (Cayman Islands) Limited v Treasure Island Resort (Cayman) Limited [2004-2005 CILR 423] and others.

Moreover, the statutory guidelines do make explicit provisions for receivers and receivership orders in relation to Segregated Portfolio Companies (SPCs). These are unique legal entities that, while single entities, are allowed to create separate

portfolios for different assets and liabilities. Each portfolio is statutorily protected from the assets and liabilities in other portfolios (Companies Act s.216). In cases where the assets linked to a specific SPC's portfolio are likely insufficient to pay off the portfolio's creditors, the Grand Court can issue a receivership order pertaining to that portfolio (Companies Act s.224(1)). This role resembles that of a liquidator, per *In the Matter of JP SPC 1 and JP SPC 4* [2013 (1) CILR 330].

A receivership order necessitates that a specified receiver manage the business and assets of, or attributable to, a segregated portfolio with the intent to wind down the business in an orderly fashion and distribute the assets to those entitled (Companies Act s 224(3)). Such an order cannot be enacted if the SPC is being wound up and will cease effect upon the SPC's winding-up commencement (Companies Act s.224(4)).

During a receivership order's application and operation period, no legal proceedings can be initiated against the SPC concerning the portfolio under the order, barring court permission (Companies Act s.226(5)). During this period, the receiver supplants the directors in their functions and powers regarding the SP's business (Companies Act s.226(6)).

Receivership can be an alternate recourse for specific creditors, apart from the SPC context. Receivers can be appointed without court involvement according to rights in a security instrument, for instance, a fixed or floating charge holder may appoint a receiver over a company's charged assets if the debtor fails its obligations (e.g., *Scotiabank (Cayman Islands) Limited v Treasure Island Resort (Cayman) Limited* [2004-2005 CILR 423]). The receiver, acting on the powers delineated in the charge document, including a sale right, generally realises the charged asset's value and repays the unpaid debt to the creditor. This receiver is not supervised by the court and typically owes its duties to the creditor, not the debtor company.

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?

BITB can take several steps to protect its interests.

Firstly, given that a large part of its loan is secured by a mortgage over four of VP's party boats, BITB can ensure that it registers its interests on them: the Cayman Islands have an ownership register for ships under s.6(3)(a) of the Maritime Authority Act. The Cayman Islands Shipping Registry (CISR) is responsible for ship mortgage registration, and is a leading international ship registry for all vessel types. Mortgages over a Cayman Islands flagged vessels are registered in the order presented to the registrar of shipping, so registration of a mortgage secures priority against subsequent mortgages registered against the same vessel. Assuming that BITB's registered mortgages are the only ones on the vessels, it will have priority over the other unsecured creditors and/or bankruptcy trustees in the event of a bankruptcy or liquidation of VP, and the vessels will sit outside the pool of assets available to any unsecured creditors.

Second, BITB could enforce its security over the boats. This can be done by appointing a receiver over the charged assets if the charging document allows for it, without court involvement, in the event of a default on the part of VP. On the facts, there appears to be such a default, as VP has fallen behind on payments. The receiver would then act to realize the value of the charged assets and repay BITB's debt.

Commented [BT17]: 3

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

JoBo can enforce the arbitral award of USD\$ 50 million by applying to the Grand Court's Financial Services Division for recognition and enforcement of the award. The Cayman Islands are party to the 1957 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, and it is therefore possible to enforce an ICC

award in the jurisdiction. JoBo could then seek to have VP's assets seized to satisfy the judgment debt.

Commented [BT18]: 2

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

The unpaid employees of VP have a few recourses available. They could file a petition to wind up the company on the grounds that it is unable to pay its debts as they fall due. In a winding-up, preferential creditors, such as employees who are owed wages or salaries, are paid before unsecured creditors.

Commented [BT19]: 1

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

Yes, the Cayman Islands Court does have jurisdiction over VP, since it is a company registered in the Cayman Islands. Even if it had been a foreign company, the Grand Court would have jurisdiction because VP has property located in the Islands, and is carrying on business in the Islands.

Commented [BT20]: 1

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

The Cayman Islands has a statutory framework for corporate restructuring, which typically involves the company applying to the court for a stay of proceedings while it presents a plan for the reorganization of its debts to its creditors. Since the Companies (Amendment) Act 2021 came into force on 31 August 2022, the most effective procedure for this is for VP to apply by petition to appoint a company restructuring officer (RO). The filing of the petition for appointment of the RO triggers an automatic stay.

The newly introduced RO regime carries several distinct characteristics. A petition can be presented to the Grand Court by a company to appoint an RO based on the following conditions: the company is, or is likely to become, unable to pay its debts, and it intends to propose a compromise or arrangement to its creditors, or specific classes of creditors.

Company directors have the authority to present this petition without needing to pass a shareholders' resolution or without any explicit power specified in the company's articles of association to present such a petition.

Upon the filing of the petition, an automatic moratorium comes into effect, preventing the initiation or continuation of any suit, action, or other proceedings, whether within or outside the Cayman Islands, without the court's permission. This moratorium is characterised by its extraterritorial reach.

Notably however, it should be appreciated that secured creditors maintain their rights to enforce their security without needing to obtain the court's permission or reference to the RO. VP should therefore seek to engage with BITB to attempt to persuade them not to enforce against their main assets, i.e. the boats, as that might render VP no longer commercially viable. There should be room for a commercial solution: BITB is unlikely to be able to realise the same value for the boats as VP if the latter can manage to continue as a going concern by restructuring their debts.

Commented [BT21]: 2.5

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

This depends on the terms of the court order appointing the RO. This will set out the the RO's functions and powers, much like well-practiced JPL appointment orders have in the past. Subject to this, the Rackham family may be able to continue to play a part in running VP during any restructuring process, provided they are acting in the best interests of the company. However, their exact role would likely depend on the specifics of the restructuring plan and any court orders issued in the course of the restructuring proceedings.

Commented [BT22]: 1

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

The Grand Court would take several factors into consideration before approving any proposed restructuring, including whether the proposed scheme is fair and equitable, whether it has been approved by a sufficient number or majority of creditors, and whether it has a realistic prospect of achieving its objectives, namely, the company's survival and the better satisfaction of creditors' claims than would be achieved in a winding-up. The court would also consider whether the scheme of arrangement complies with all relevant laws and regulations, and whether it is in the best interests of the creditors.

Commented [BT23]: 2

Commented [BT24]: 12.5

Commented [INS 125]: GRAND TOTAL = 46 / 50

Commented [BT26]: TOTAL MARKS 12.5 OUT OF 15

* End of Assessment *