



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.**

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.**

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.*

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.**

Question 1.5

Select the correct answer.

*In a provisional liquidation, the existing management:*

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

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

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

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.**

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.*

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.*

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.*

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 [BT1]: 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?**

*It is possible for a creditor to register its security over an asset in the Cayman Islands. The Cayman Islands have ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property. These registers are centrally maintained and mortgages and charges can be registered therein. Registration means that a third party purchaser of the charged asset will be deemed to have notice of any such interest and will therefore acquire the asset subject to the secured creditor's interest. Registration also gives the secured creditor priority over non-registered creditors.*

*However, there is no public security registration regime in the Cayman Islands for other types of assets.*

Commented [BT2]: So what can such a creditor do? See Guidance Text 5.3. 2 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 Grand Court has power to assist foreign bankruptcy proceedings. Its powers to make orders in support of foreign insolvency are provided for in Part XVII of the Companies Act.*

*There are no threshold tests for the grant of assistance, nor are there automatic rights based on the centre of main interests of the debtor. Instead, foreign representatives must satisfy the Cayman Court that it is appropriate for the court to exercise its discretion by granting the relief sought in the foreign representative's application.*

*In determining whether to make these ancillary orders, the Grand Court is guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with:*

- *the just treatment of all holders of claims, wherever they are domiciled, in accordance with established principles of natural justice;*
- *the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings;*
- *the prevention of preferential or fraudulent dispositions of property in the debtor's estate;*



- *the distribution of the estate among creditors substantially in accordance with the statutory order of priority;*
- *the recognition and enforcement of security interests created by the debtor;*
- *the non-enforcement of foreign taxes, fines and penalties;*
- *comity (mutual recognition and co-operation concerning legal decisions).*

Commented [BT3]: 3.5 marks

Question 2.3 [maximum 3 marks]

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

*In cross-border cases, the Grand Court adopts a co-operative approach to ensure an effective winding-up and the protection of the interests of its creditors, wherever those creditors are situated.*

*The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments, neither has the UK extended its ratification of any such treaties to the Cayman Islands by Order in Council (save for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).*

*The Cayman Islands is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.*

*The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for recognition and enforcement of foreign judgments but only where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgments. To date, the provisions of the Act have only been extended to judgments from the Superior Courts of Australia. This procedure is governed by Order 71 of the Grand Court Rules.*

*Given the limited application of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision), the enforcement of foreign judgments is usually achieved by commencing a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation. Such actions are conducted under the regular procedural regime for litigation in the Cayman Islands (that is, The Grand Court Rules). Money and non-money judgments (including declaratory judgments) are enforceable at common law.*

*The mandatory requirements for enforcement of a foreign judgment at common law are:*

- the judgment is 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*

*(e) the foreign judgment was not obtained contrary to the rules of natural justice.*

*Once a local judgment has been obtained, the full range of domestic enforcement remedies are available.*

Commented [BT4]: 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.***

*Section 99 of the Companies Act states that any dispositions of a company’s property made after the deemed commencement of the winding-up will be void if a winding-up order is subsequently made. Where no petition has as yet been filed, any such transaction is not caught by section 99 however it may be subject to the following claw-back mechanisms:*

***Voidable preference***

*According to Section 145 of the Companies Act, any payment or disposal of property to a creditor constitutes a voidable preference if 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.*

*A disposition made to a ‘related party’ of the company will be deemed to have been made with a view to giving a preference.*

*A disposition that is set aside as a preference is voidable upon the application of the liquidator, who may ask the Grand Court to order the creditor to return the asset and prove in the liquidation for the amount of its claim.*

***Avoidance of Dispositions made at an undervalue***

*Section 146 of the Companies Act provides that a transaction in which property:*

- is disposed of at an undervalue; and*
- with the intention of wilfully defeating an obligation owed to a creditor (that is, an intent to defraud)*

*is voidable on application of the liquidator.*

*"Undervalue" is defined to mean the provision of no consideration or a consideration which in money or money's worth is significantly less than the value of the property.*

*The burden of proof is on the creditor or liquidator (seeking to have the disposition set aside) to establish an intent to defraud.*

*The application must be brought within six years of the disposal.*

#### **Fraudulent trading**

*Section 147 of the Companies Act deals with fraudulent trading.*

*If the business of a company was carried on with intent to defraud creditors, or for any fraudulent purpose, a liquidator may apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company's assets as the Court thinks proper.*

**Commented [BT5]:** Good but don't forget the common law solution for breach of fiduciary duty -7/9.

**Question 3.2 [maximum 6 marks]**

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

*This statement is incorrect.*

*Receivers may be appointed albeit they are not explicitly mentioned in the statutory provisions dealing specifically with insolvency (namely the Companies Act and Companies Winding up Rules). The Grand Court Rules (CR) contemplate that receivers may be appointed by the Court for the purposes of collecting money (for example, rents) or to carry out some other act (for example, the execution of a contract or a document of title).*

*Order 30 GCR governs the appointment and duties of receivers generally. Order 45 GCR (which deals with enforcement of judgments and orders generally) states that receivers may be appointed to enforce court orders for the payment of money. Order 51 GCR also provides for the appointment of receivers by way of equitable execution.*

*Receivers and receivership orders are, however, specifically provided for by statute in respect of a particular type of Cayman Islands legal entity, namely the Segregated Portfolio Company.*

*If the Grand Court is satisfied that the SPC's assets attributable to a particular portfolio of the company are likely to be insufficient to discharge the claims of creditors in respect of that portfolio, it may make a receivership order in respect of that portfolio. The role is analogous to a liquidator.*

**Commented [BT6]:** Good. Reference to specific statutory sections would have achieved 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 has lent VP USD 300 million, 180 million of which is secured by a mortgage over four of VP's largest party boats.***

***Because VP has fallen behind on the monthly repayments to BITB, BITB has the rights to enforce the security over the unpaid 180 million loan, and can demand payment of the entire unsecured amount against VP.***

***BITB's options include: 1) to enforce the mortgage over four of VP's largest party boats, making application to appoint receivers and subsequently obtain order to sell; 2) to issue a statutory demand against VP for the unsecured amount of 120 million plus interests accrued; and 3) to apply for winding up of VP based on the***

company being insolvent (either due to non-payment of the Statutory Demand after the 21 days period past, and/or due to balance sheet **insolvency**).

Commented [BT7]: 2.5

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

JoBo has obtained an ICC arbitration awards ordering that VP must pay damages of USD 50 million to it within 45 days.

JoBo can apply for recognition and enforcement of the ICC awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Foreign Arbitral Awards Enforcement Act of 1997 (FAAEA). Once the recognition is obtained, the full range of domestic enforcement remedies are available. JoBo can enforce the debt by way of applying for a charging order over assets of VP.

Commented [BT8]: 2.5

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

The unpaid employees are preferential debtors. They can petition the Court to wind up the company based on its **insolvency**.

Commented [BT9]: 1

In an official liquidation, a secured creditor's rights in a liquidation are superior to the rights of all other parties and sit above the order of priorities listed immediately below.

The order of priorities in an official liquidation is as follows:

- (a) liquidation expenses (which include petitioner's costs, the costs of any restructuring officer and OL's fees and expenses)
- (b) preferential debts
- (c) amounts due to preferred shareholders;
- (d) debts incurred by the company in respect of the redemption or purchase of shares; and
- (e) any surplus remaining after payment of the above amounts is returned to the company in accordance with its articles or any shareholders' agreement.

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

Cayman Islands Court has jurisdiction over VP because it is registered in the Cayman **Islands**.

Commented [BT10]: 1

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

VP may 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 (or classes of creditors)

- *The petition may be presented by the directors of the company without a resolution of the shareholders and without there being any express power to present a petition in the company's articles of association.*

*A moratorium (meaning that no suit, action or other proceedings, whether domestic or foreign, may be initiated or proceeded with without leave of the court) is automatically triggered upon the filing of the petition. The moratorium has extraterritorial effect.*

*Although note that secured creditors will continue to be entitled to enforce their security without leave of the court and without reference to the RO.*

Commented [BT11]: 2

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

*The Rackham family may be able to continue play a part in running VP during any restructuring process unless it is discovered there are mismanagement or fraudulent behaviours on the current management's part. The RO's functions and powers will be set out in the terms of the court's order appointing them.*

Commented [BT12]: 1

*Once the RO is appointed, the restructuring may take several forms. It may involve a consensual deal or other informal work-out with creditors of the company. Alternatively, it may use a Cayman Islands scheme of arrangement (see immediately below).*

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

*The Court will be concerned with:*

- *compliance with the convening orders;*
- *whether the majority fairly represent the class; and*
- *whether the arrangement (having regard to the alternatives) is such that an intelligent, honest member of the class convened, acting in their own interest, might reasonably approve it.*

Commented [BT13]: 2

Commented [BT14]: Good but entire answer would have been enhanced by citation of sections of laws. 12

\* End of Assessment \*

Commented [BT15]: 42.5 OUT OF 50