



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

Commented [BT1]: Incorrect. Answer was (c)

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.

Commented [BT2]: Incorrect. Answer was (b)

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 [BT3]: Incorrect. Answer was (c)

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 [BT4]: 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?**

*With the exception of real estate, ships, aircraft, motor vehicles and intellectual property, there is no public security registration regime in the Cayman Islands. A creditor can therefore register its security (mortgage or charge) over certain types of assets, however for other types of assets enhanced due diligence may be required in order to confirm that the creditor has sufficient control. For security interests that can be registered, it is helpful in that the register of mortgages and charges is open for inspection by any member of the company or a creditor. It is the debtor's obligation to make sure the register is promptly updated, however their failure to do so does not invalidate the security interest. Interestingly, registering a security interest does not create priority - this is instead determined by the location of the asset and the local laws applicable in that jurisdiction, in line with Cayman Islands' conflict of law rules.*

*Most common form of security rights granted to lenders in relation to movable (mortgage, fixed charge, floating charge, pledge and lien) and immovable assets (mortgage, fixed charge), are broadly in line with other common law jurisdictions, and entitle the security holder to enforcement over the assets without the leave of the Court, or reference to the liquidator. Furthermore, there is no stay on enforcement of secured creditor's interests, unlike in US Chapter 11 proceedings.*

**Commented [BT5]:** Decent but probably worth re-reading 5.3 Guidance Text. 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?**

*Part XVII of the Companies' Act grants the Grand Court powers to assist in the conduct of foreign insolvency proceedings. Most principles of the UNCITRAL Model Law on Cross Border Insolvency are followed even though the Cayman Islands have not actually implemented this aspect of the Model Law. In addition, there are laws in place that provide a Cayman official liquidator (an officer of the Cayman Court) an opportunity to enter into international protocols with foreign officeholders in order to avoid duplication of work, cross-border conflicts between the officeholders and most importantly an orderly administration of the estate. In addition to the Companies Act referenced earlier, other relevant provisions include the Companies Winding Up Rules O.21, the Grand Court Act / Section 11A and the Grand Court's Practice Direction 1 of 2018.*

*However, in order for the Court to be involved in a foreign proceeding, there are no prescribed tests, nor are there automatic rights granted to the debtor. Instead foreign representatives must satisfy the Court that the relief and involvement sought is appropriate, i.e., will result in an economic and expeditious administration of the*



**debtor's estate.** *Circumstances most likely to trigger involvement of the Grand Court would be the fair and equitable treatment of creditors, prevention of preferential treatment or fraud against creditors, recognition of security interests created by the debtor and helping preserve the order of creditor priority in line with relevant laws.*

**Commented [BT6]:** This is what the examiner was interested in - section 242. 2.5 marks.

*Most recently, the introduction of restructuring officers via the changes to Part V of the Companies Act has probably enhanced the role of the Cayman Court. The new regulation provides debtors with a global moratorium which is automatic upon the filing of the application to appoint a Restructuring Officer. We can therefore expect even more cross-border involvement and cooperation between courts, as that moratorium is enforced over assets that are invariably located outside of the Cayman Islands.*

Question 2.3 [maximum 3 marks]

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

*Enforcement of foreign judgements is most often achieved by using the judgement as an unsatisfied debt / obligation and commencing new action in the Cayman Islands. There are several conditions that a foreign judgement needs to meet before it can be enforced, for example - it needs to be final, cannot have been obtained by fraud, the relevant court must have had jurisdiction over the debtor and the judgement must not be contrary to the public policy of the Cayman Islands. If those conditions (amongst others) are satisfied, the judgements are enforceable at common law.*

*Reason for this approach is that Cayman Islands are not party to any international treaty on reciprocal recognition or enforcement of foreign judgements (excluding the New York Convention in relation to arbitral awards). Therefore using international treaties to enforce foreign judgements in Cayman Islands is not an option.*

*Furthermore, the only country that is assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgements (and therefore meets the criteria of the Foreign Judgements Reciprocal Enforcement Act - 1996 Revision) is Australia (specifically - only the judgements from its Superior Courts). Other countries do not enjoy this status, and therefore judgements from their local courts would not qualify for recognition and enforcement in the Cayman Islands.*

**Commented [BT7]:** 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.**

*Although not codified in the Cayman Islands’ statute, the directors of Cayman Islands’ companies are in a position of trust and confidence and are therefore subject to fiduciary duties (with reference to UK common law) with respect to the company and its stakeholders. At its core the directors are expected to act in good faith, with skill, care and diligence, always in the interest of the company, while avoiding conflicts of interest. If this duty is breached, directors can be made personally liable for any losses incurred by the company, which is particularly relevant in the case of a liquidation, where the directors could have breached their duty towards creditors at a point in time when the company was insolvent.*

*In addition, Companies Act has a number of sections that could be used to either recover a company’s assets, or pursue claims for damages against responsible parties, specifically:*

*a) Section 99 (property dispositions post winding-up commencement)*

*Unless validated by the Grand Court, any dispositions of assets after the commencement of the winding up (i.e., the date on which the petition is filed), are deemed to be void, and the liquidator is entitled to require the asset to be returned or for the funds to be repaid. If the winding up petition has not yet been filed (i.e., winding up has not yet commenced) one of the other sections listed below could be used to remedy the disposal.*

*b) Section 145 (voidable preferences)*

*Disposal of property to a creditor in the six months prior to the commencement of the company’s liquidation (at a time when it is not able to pay its debts) and with the intention (not easy to prove!) of the directors to prefer the creditor over others, constitutes a voidable preference. This is especially true in the case of related party creditors, where any dispositions are deemed to have been made as a preference. In any event, the liquidator has the power to ask the Grand Court to order the creditor to return the asset and submit a claim in the liquidation.*

*c) Section 146 (disposition at undervalue)*

*If a property is sold for an amount which is significantly less than its value (TBD how this is established - traditionally it is three market bids and an independent valuation report), with the intention of defrauding a creditor (i.e., defeating their claim), then the disposition is voidable by the liquidator. Application to set aside this transaction must be brought within six years of the disposal.*

*d) Section 147 (fraudulent trading)*

*If the company traded with intent (not easy to prove!) to defraud creditors, or for any fraudulent purpose, the liquidator can apply to the Court for the responsible parties to contribute to the company's assets to the extent that the Court finds necessary.*

**Commented [BT8]:** Good. Case law would have secured full marks. 8/9.

Question 3.2 [maximum 6 marks]

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

*Receivers' roles in an insolvency are not explicitly mentioned in the Cayman Islands' Companies Act, nor the Companies Winding up Rules. However, the Grand Court Rules (GCR) permit the appointment of receivers (by the Court) to collect money or to carry out some other act.*

*Outside of Court supervision, creditors may be able to appoint a receiver in case of the debtor defaulting on a payment in relation to a fixed or floating charge. The creditor needs to ensure that the right to appoint a receiver is included in the charge document. Once appointed the receiver will be entitled to act in line with the powers in the charge document and will typically include the right to sell the charged asset in order to recoup the outstanding debt. The receiver typically owes their duty of care to the creditor (not the debtor) and do not need to report to the Court.*

*Receivers also play an important role in the context of Segregated Portfolio Companies (SPCs), i.e., companies that are allowed to create separate portfolios of for the purpose of classifying different assets and liabilities. Each portfolio is ring-fenced from other portfolios under the same SPC. In instances where the assets of a particular portfolio are insufficient to repay the portfolio creditors, the Court (providing they concur with this solvency assessment) can appoint a receiver, who would have the same powers / authority as a liquidator. On the surface this appears very similar to the appointment of a liquidator over a subsidiary within a wider group of companies, whereby the rest of the group continues operating while the liquidator wrestles control away from the former subsidiary directors and proceeds to realize assets in order to repay the creditors at subsidiary level. It is important to note the status of the SPC itself determines whether a receiver can be appointed or not. Once SPC enters the process of winding up, the receivership order ceases to have effect.*

**Commented [BT9]:** Good. Reference to provisions of GCR, s.224 and case law needed to secure 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?***

***To start with, given that BITB has security over four largest party boats (worth US\$180m), BITB could enforce that security in order to at least protect a portion of its overall exposure to VP. For example, BITB could appoint a receiver over each of the four boats, providing the original loan documentation provided for such a remedy.***

***Before taking this step, BITB would first need to ensure that its security is properly registered in the Cayman Islands by reference to an ownership register for ships. It is not farfetched to assume that each of the boats will be registered under separate corporate vehicles to avoid potential cross-contamination of liabilities. Therefore, BITB would first need to ensure the security register is up to date, and that the laws applicable to the corporate vehicles housing the boats are friendly towards secured creditors, since the location of the asset determines the law governing the priority and perfection of security interests.***

***In addition, given the BITB's overall exposure is US\$300m, they would have to prove for the remaining US\$120m in a liquidation, and would be a (significant but) unsecured creditor that would likely drive the course of that liquidation.***

***Finally, depending on BITB's outlook on VP's ability to continue as a going concern, BITB could move to appoint a provisional liquidator (with the intention to***

then transition to official liquidation), in order to wrestle control away from existing directors and preserve and protect VP's assets - especially since they are boats that can be moved and docked in any of the ports around the world. Given the size of BITB's exposure, it is likely going to be the largest creditor and therefore have the most influence on the liquidation committee.

Commented [BT10]: 3

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

Although it is not entirely clear, one would presume that JoBo is not a Cayman company. Furthermore, JoBo would be trying to enforce an arbitral award from the ICC (with London being the seat of the arbitration). Considering that the Cayman Islands are subject to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (as a result of the UK's Order of Council), JoBo would then be well within their rights to enforce the award in the Cayman Islands, with the assistance of the Grand Court.

Commented [BT11]: 2

If the award is unlikely to be satisfied (given VP's current financial situation), then JoBo would become a bona-fide unsecured creditor of VP and could potentially look to liquidate VP in order to repay its debts. Under such circumstances JoBo would presumably be the second largest unsecured creditor of VP, ranking just behind BITB (US\$120m unsecured) with US\$50m exposure.

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

I am not entirely sure where the employees of VP are registered. Are they employees of VP Cayman branch / registered company or are they the employees of each individual vehicle that houses the boats (for risk mitigation purposes) or are they employees of VP Europe (as an example) that is registered in Cayman? Apologies if I missed this in the question, but the steps the employees would have to take would be different depending on where their employment contract sits. For the purposes of this question, I am going to assume that they are employed directly by VP Cayman, and therefore Cayman insolvency laws apply (i.e., no need to initiate claims in other jurisdictions, get them recognized in Cayman, etc.). I am not entirely clear on the distinction between a Cayman registered company and a Cayman incorporated company.

Presumably the employees are each owed KYD100 at a minimum. Therefore, they would be able to serve a statutory demand on VP for the amounts outstanding, and assuming those amounts will remain unpaid for 21 days (otherwise VP could be accused of giving employees preferential treatment relative to other creditors), they will be able to initiate a winding-up petition against VP, thereby benefiting from their preferential creditor position, and being able to share in some of the asset realisations with the Cayman tax authorities (presumably negligible amounts) and other unsecured creditors, once the liquidation expenses have been settled. Alternatively, VP will have to negotiate with employees as part any

Commented [BT12]: This is the point. 1 mark.

*scheme / restructuring, knowing well that a restructuring cannot be executed operationally without the cooperation of employees.*

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

*Since VP is a company registered in the Cayman Islands, according to Section 91 of the Companies Act, the Grand Court has jurisdiction over VP.*

Commented [BT13]: 1.5

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

*Facing a dire situation, with likely enforcement by BITB over the company's four largest boats, and the imminent enforcement by JoBo of the ICC arbitral award, VP could apply to the Grand Court for the appointment of a Restructuring Officer. Main purpose of this action would be to institute a moratorium (albeit not binding on the secured creditors), provide some breathing room to VP to prepare a restructuring proposal (in conjunction with the Restructuring Officer) and find a compromise with its creditors. Given the uptick in the tourism market, one would presume that this would be in the best interest of all the parties involved.*

*Historically, VP could have filed for provisional liquidation, and with the appointment of a provisional liquidator (a qualified IP), try to negotiate a compromise with its creditors, final outcome most likely taking some form of a scheme of arrangement. However, as of 30 August 2022, PL is being replaced by the concept of a Restructuring Officer. Personally I find this extremely helpful, having been involved in restructuring discussions in the past where shareholders (high profile US based VC investors) refused to even consider the concept of PL because it contained the word "liquidation".*

Commented [BT14]: 2.5

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

*With the appointment of the Restructuring Officer ("RO"), the Rackham family would continue to be involved in running VP - albeit under the supervision of the RO. Obviously, the creditors and the Grand Court would have to be convinced that this is in everyone's best interest, otherwise any restructuring negotiations will ultimately fail, forcing VP into liquidation, and thereby taking the managerial power away from the Rackham family. If there has been a loss of trust between the parties, it may be better (in the interest of preserving their long-term economic stake) for the Rackham family to step aside and allow independent management to step into their shoes. Loss of control aside, Rackham family may also be concerned about any fact-finding mission that the IP may be asked to undertake by the creditors, which could unearth other activities (and pockets of assets) that may be of interest to creditors and the Grand Court.*

Commented [BT15]: 1

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

*Once the Restructuring Officer has been appointed, the actual compromise to be negotiated with creditors may take several forms, including but not limited to an informal work-out, Cayman Islands' scheme of arrangement or form part of a wider restructuring proceeding (e.g., US Chapter 11). In the context of the Cayman Islands' restructuring, and keeping with the tradition of the PL process, the most likely route to a negotiated compromise between the debtor and its creditors is going to be a scheme of arrangement. With that context in mind, the Grand Court would take the following points into consideration at the time of the convening hearing:*

- *Class composition (i.e., making sure that the creditors are allocated properly to each class and that the allocation is not done in a way so as to prejudice any particular class of creditors);*
- *Jurisdictional issues (i.e., is the Grand Court best placed to opine on this restructuring proposal, or should it be subject to review by another court, especially if there are parallel proceedings taking place elsewhere);*
- *Adequacy of information provided to creditors (i.e., can the creditors be reasonably expected to make a decision based on information provided or is further data required); and*
- *Notice (i.e., have all the creditors been given sufficient and adequate notice so they can submit their claims and attend subsequent meetings).*

*Before approving the proposal, in order to make it binding on all the creditors, the Grand Court would also consider the following:*

- *Compliance with convening orders (i.e., have all the procedural guidelines been followed to date);*
- *Whether majority fairly represent the class (keeping in mind it is not necessary for the scheme to be negotiated / agreed with all the company creditors - only the ones whose claims will be compromised); and*
- *Whether an intelligent, honest member of the class convened, acting in their own interest would reasonably approve the **scheme**.*

**\* End of Assessment \***

Commented [BT16]: 2

Commented [BT17]: 13/15

Commented [BT18]: TOTAL MARKS 40.5