



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?

Yes.

For example, with real property, title to land must be registered with the Registrar of Lands at the Cayman Islands Land Registry. A mortgage over land may similarly be registered with the Land Registry.

Similarly centrally maintained registers exist for ships, aircraft, motor vehicles, and intellectual property, and mortgages, and charges over the same, can be registered there.

The effect of registration of security on these registers is that a third-party purchaser of the registered asset will be deemed to have notice of the interest and will acquire the asset subject to the secured creditor's interest.

There is no centrally maintained register for security over shares.

Commented [BT2]: First part is good but fails to demonstrate knowledge of register of mortgages and charges under companies act. See Guidance Text 5.3. 1.5 marks.

Question 2.2 [maximum 4 marks]

Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?

Yes.

The source of the Grand Court's the power to assist foreign bankruptcy proceedings is Part XVII of the Companies Act (2023 Revision). The Cayman Islands has not implemented the UNCIRTRAL Model Law on Cross-Border Insolvency.

*The criteria for the Court to exercise its discretion to assist is found in section 242(1) of the Act. In particular, the Court will pay attention to (*inter alia*) the following circumstances:*

- (a) the just treatment of all creditors (and other claim holders) irrespective of where they may be domiciled;*
- (b) the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;*
- (c) the prevention of preferential or fraudulent dispositions of property (which are otherwise subject to redound to the debtor's estate);*

- (d) the recognition and enforcement of security interests owed / created by the debtor in favour of secured creditors;
- (e) the non-enforcement of foreign taxes, fines and penalties; and
- (f) the general interests of comity.

Commented [BT3]: 4 marks

Question 2.3 [maximum 3 marks]

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

The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgements. The New York Convention only applies to arbitral awards.

However, Cayman has enacted the Foreign Judgments Reciprocal Enforcement Act (1996 Revision). The Act only applies where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of judgments.

This statute is rarely used, and is governed by O 71 of the GCRs. To be enforceable the judgment must be final, a monetary judgement, and made after the Act was extended to the relevant country (which reciprocally enforces judgments).

As the result of a narrow statutory framework, most enforcement occurs in accordance with the common law. To be enforceable at common law the judgment must be:

- a final judgment
- the foreign court must have had jurisdiction over the debtor in Cayman;
- the foreign judgment cannot be obtained by fraud;
- enforcement cannot be contrary to public policy in the Cayman Islands; and
- the foreign judgment must not be obtained contrary to the rules of natural justice.

A six year limitation period applies at common law.

Once enforcement is ordered, the judgment may be executed in the usual way.

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.

There are no wrongful statutory trading provisions in the Cayman Islands. However, a director who continues to trade, knowing that a company is insolvent (or is likely to become insolvent), will likely be in breach of their fiduciary duties.

The company may bring a claim against a director for monetary damages for breach of common law fiduciary duties if a director fails in their duty to:

- *act in what the director *bona fide* considers to be the best interests of the company;*
- *exercise their powers for the purposes for which they are conferred;*
- *avoid conflicts of interest and of duty;*
- *disclose personal interest in contracts involving the company;*
- *not make secret profits from the directors' office; and/ or*
- *act with skill, care and diligence.*

It is also possible to claw back certain property dispositions that the directors should not have made.

Voidable preference. Section 145 of the Companies Act (2023 Revision) provides that any disposal of property to a creditor constitutes a voidable preference if it occurs within 6 months of the deemed commencement of the company's liquidation, at a time when the company was not able to pay its debts, and the dominant intention of the company's director(s) was to give the relevant creditor a preference over other creditors. Giving a preference means putting the creditor in a better position than they would have been. The disposition is voidable at the application of the liquidator, and may require the transferee to return the received property.

Avoidance of dispositions made at an undervalue. Section 146 of the Companies Act (2023 Revision) provides that property disposed of at an undervalue with the intention of wilfully defeating an obligation owed to a creditor will be voidable at the application of a liquidator. Undervalue means the provision of no consideration or consideration which is significantly less than the value of the property. The application must be brought within six years of the disposal.

Fraudulent trading. Section 147 of the Companies Act (2023 Revision) provides that if the business of the debtor was carried on with the intent to defraud creditors, a liquidator may require a person who was knowingly party to the such conduct to make contributions to the debtor's estate.

Question 3.2 [maximum 6 marks]

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

This is not entirely accurate, receivers are not explicitly mentioned in the statutory provisions, but often have a role to play in the insolvency context.

Commented [BT5]: Good. Reference to case law would have secured full marks. 8/9.

Receivers are not liquidators, but at a high level, receivers may be appointed to a company for the purpose of collecting money owed to the company, or to carry out any other legal act, for example the execution of contracts, or in relation to dealing with documents of title.

In more detail, a receiver is generally appointed to take control of the assets of a debtor. It may be done by the court, or under a security document following an event of default. As noted above, their role will usually include:

- taking possession of the company's assets;
- managing the business, if required;
- selling the company's assets, if required; and
- reporting to the Court, or the secured creditor, as required.

To say receivers have no role to play is therefore unfair. As noted above, receivers are often put in place to be responsible for protecting the assets of the company, and realizing those assets for the best possible price, often times in situations where title to the company itself is disputed.

O 30 GCR governs the appointment of receivers **generally**.

Commented [BT6]: Good but lacking specifics. And what about SPCs? See section 6.4 study guide. 3/6.

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 should have prospectively registered its mortgage over VP's four large party boats on the relevant vessel mortgage register in accordance with the Maritime Authority Law.

*That said, even if the mortgage is not registered, BITB will still likely still have the power to (*inter alia*) (1) sell the vessels, (2) enter into possession of the vessels, or (3) appoint a receiver to sell the vessels under the terms of the relevant vessel mortgage, following what will likely be an event of default (having considered the text of the question above).*

Naturally, the security over the four vessels has only be used to secured up to 180 million in debt, and thus any value received for the vessels above that amount (accounting of course for interest and any other expenses allowable under the terms of the mortgage document) must be returned to the VP in accordance with its equity of redemption.

Especially as BITB cannot recoup its entire loan through enforcement of security (as explained above), enforcement (and the sale of the vessels potentially below market price) may not be in BITB's best interests.

*In any event, the course of action outlined above is open to BITB to protect its interests if it deems that **appropriate**.*

Commented [BT7]: 2.5

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

JoBo has received an award of USD 50 million from an ICC London seated arbitration, which is payable by VP within 45 days.

First, JoBo should write to VP demanding payment within 45 days, and provide bank details for said payment.

Secondly, if no payment occurs, JoBo should move to enforce the award under the terms of the Foreign Arbitral Awards Enforcement Act. Pursuant to the Act, an award may only be refused in accordance with section 7 in very limited circumstances.

Third, once the Court has enforced the award, JoBo may seek a writ of execution against VP's property under O. 46 GCR. It is for reasons such as this that BITB should have prospectively registered its mortgage over VP's four large party boats (as under the terms of the security documents BITB will have first priority to these assets).

Commented [BT8]: 2.5

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

Unpaid employees may take action against VP.

Following the payment of liquidation expenses, employee liabilities constitute a class of preferential debts (which rank in higher priority to ordinary debts).

Commented [BT9]: 1

Action might include applying to put the company into liquidation, or otherwise putting in a proof of debt in the liquidation.

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

VP is a company registered in the Cayman Islands.

As such, the Grand Court will have jurisdiction over corporate liquidations and restructurings in relation to the company in accordance with section 91 of the Companies Act (2023 Revision).

Commented [BT10]: 1.5

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

Yes.

A restructuring petition may now be brought on behalf of a company by its board. The new provisions came into force on 31 August 2022, and provide a similar regime to Chapter 11 in the US.

Pursuant to section 91G of the Companies Act (2023 Revision), when a restructuring petition is presented (and has not been withdrawn or dismissed) all civil proceedings against the petitioning company are stayed, creating an automatic moratorium on claims against the debtor which is activated at the time that a Petition is filed (rather than having to wait for the PL order as you used to in the past, and as was the case under the old regime).

Commented [BT11]: 2

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

Yes.

A RO's role may be tailored to meet the needs of the restructuring. The appointment may be light touch, where the company's management can stay in control of the

Commented [BT12]: 1

company and the day-to-day operations. That said, the RO will still be responsible for providing independent assistance to management in respect of the formulation of a restructuring plan and negotiating with the company's stakeholders.

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

The Grand Court will take into consideration a number of factors. Perhaps the most relevant are:

- *Whether the majority of members or creditors who voted for the scheme fairly represents the particular member or creditor class; and*
- *Whether the arrangement is such that an intelligent and honest member of the relevant class, acting in their own interest, might reasonably approve the scheme.*

Commented [BT13]: 1.5

Commented [BT14]: 12/15

*** End of Assessment ***

Commented [BT15]: 41.5 / 50