



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.**

Commented [BT1]: Incorrect. Correct answer was (c)

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

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

Question 1.6

Select the correct answer.

When a winding up order has been made, a secured creditor:

(a) May enforce their security with leave of the court.

(b) May enforce their security with leave of the court provided the liquidator is on notice of the application.

(c) May enforce their security without leave of the court.

(d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.

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.

Commented [BT2]: 9/10

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.**

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, the Cayman Islands has an ownership register that is centrally maintained for things like ships, aircraft, real estate, motor vehicles and intellectual property. Creditors are permitted to register mortgages and charges on these registers.

The impact of registration is such that third-party purchasers will be deemed to have notice of the interest and will therefore acquire the asset subject to the secured creditor interest. Such registration also afford the secured creditor priority over any non-registered creditors.

No public registration regime exists for any other type of assets.

Commented [BT3]: Good but needs further detail on the company's register of mortgages and charges. 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, Part XVII of the Companies Act ("The Act") powers a Court to make orders in support of foreign insolvency proceedings. There are no threshold tests for the grant of assistance, nor are there automatic rights based on COMI. Rather, foreign representatives need to satisfy the Cayman court that it is appropriate for it to exercise its discretion to grant the relief sought by the foreign rep's application. The Grand Court of the Cayman Islands can grant ancillary relief to foreign representatives, including (section 241 of The Act):

- a. Recognition of the foreign rep to enable it to act in the Islands; and**
- b. Order property to be handed over to a foreign rep.**

Reference should also be made to the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 (the "FBPR 2018"). Foreign representatives can be recognised in the Cayman Islands and seek assistance from the Grand Court in respect of foreign bankruptcy proceedings.

A foreign bankruptcy proceeding includes those instituted for the purposes of reorganisation and rehabilitating an insolvent debtor (see s 240 Companies Act).

Commented [BT4]: The examiner was looking for reference to, and criteria set out at, section 242 Companies Act - 1.5 marks

Question 2.3 [maximum 3 marks]

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

The Grand Court adopts a cooperative approach to ensure effective winding-up and for the protection of creditor interests, irrespective of where they are located.

Whilst the Cayman Islands has not entered into any international treaties providing for the reciprocal recognition or enforcement of foreign judgments, it does however have The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the "FJREA"). This provides a statutory scheme for the recognition and enforcement of foreign judgments, in circumstances where the country from which the judgment stems assures substantial reciprocity of treatment regarding enforcement of judicial decisions of the Cayman Islands (section 3(1) of the FJREA. So far, only decisions of the Superior Courts of Australia have been used via this statutory recognition mechanism, which also, is governed by Order 71 of the Grand Court Rules (the "GCR").

In order for a foreign judgment to be enforceable, it must be final, a monetary judgment and made after the FJREA was extended to the relevant foreign country.

Beyond the limited application of the FJREA, enforcing foreign judgments is achieved by commencing new Cayman Islands proceedings based on a foreign judgment being an unsatisfied debt or some other obligation - such applications being conducted under the GCR. Both monetary and non-monetary judgments can be enforced at common law (see Bandone v Sol Propertyies 2008 CILR 301. Core requirements for enforcing foreign judgments at common law include: final judgment, foreign court being seized with jurisdiction over the debtor, foreign judgement is not contrary to the public policy of the Islands and the judgment was not obtained contrary to rules for natural justice.

Commented [BT5]: 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.

Despite no statutory prohibition on insolvent trading, there are several ways in which court-appointed liquidators or company creditors can seek to hold former directors to account. Directors can be held personally liable for the company losses which they caused where they are shown to have acted in breach of their fiduciary duty to act in the company's best interests. By way of example, in the case of Prospect Properties v McNeill [1990-91 CILR 171], the Cayman Islands Grand Court found that if a company is insolvent, its directors' duty to act in the best interests of the company meant that

they must have accord to the interests of creditors. In those circumstances, creditors want to be paid and it's in the company's interest to be prevent from being placed into a position where it cannot pay its debts. If the insolvent company is in official liquidation, the company's officer liquidator is able to make claims against directors on behalf and in the name of the company for breach of the fiduciary duties that they owed.

If the directors' conduct was so flagrant to be considered fraudulent, section 147 of The Act might apply - if the directors carried on the business with an intent to defraud creditors, or for any other fraudulent purpose, the company's liquidator could apply for orders requiring any person knowingly involved in the fraud (including directors) to make contributions to the company's assets as the Court see fit.

If the directors' conduct involved the disposition of property in nefarious circumstances, there are several options to seek to claw back said property. These include:

- a. Avoidance of property dispositions: pursuant to section 99 of The Act, any disposition of property made after the deemed commencement date of winding up will be void if a winding up order is made, and unless the Court's validates such transaction. Liquidators are empowered to apply for relief to require repayment of funds of asset return.**
- b. Voidable preferences: pursuant to section 145 of The Act, payments or property disposals to a creditor will be treated as a voidable preference if it took place in the 6 months before the commencement of a company's liquidation and when it was insolvent and the dominant purpose of the directors was to grant a preference over other creditors (see e.g. re Weaving Macro Fixed Income Fund Ltd (in Liquidation) [2019 (2) CILR 245]; [2019] UKPC 36). Any such disposition that's treated as a preference is voidable at the application of the liquidator, who can seek relief from the Grand Court to require the creditor to return the asset.**
- c. Avoidance of dispositions at an undervalue: pursuant to section 146 of The Act, where property is disposed of at an undervalue with the intention of defeating obligations owed to a creditor, it will be treated as voidable at the option of the liquidator. The burden is on a creditor or liquidator to establish an intention to defraud, such application to be brought within 6 years of the relevant disposal.**

Commented [BT6]: 9/9

Question 3.2 [maximum 6 marks]

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

I disagree with the proposition that receivers have no role to play in the Cayman Islands insolvency sphere. In fact, they have plenty a role to play, and this can be seen in many ways.

Receivers can be appointed despite them having not explicit mention in the statutory insolvency provisions of either The Act of the Companies Winding Up Rules. The GRC does, however, provide for receivers to be appointed by the Grand Court for collecting money or to carry out some form of other act, like documenting a title or executing a contract. The duties and appointment of receivers is set out in Order 30 of the GRC. Further, Order 45 of the GCR provides that receivers can be appointed to enforce order for monetary payment, in circumstances of the enforcement of judgments and orders. Further, receivers can be appointed by way of equitable execution, pursuant to Order 51 of the GCR.

In another particular context in the Cayman Islands, receivers and receivership orders are specifically included in The Act in respect of Segregated Portfolio Companies ("SPCs"). These are companies that have separate portfolios within which assets and liabilities of those portfolios are limited to those portfolios - they are ringfenced within the portfolio pursuant to section 216 of The Act. In circumstances where the Grand Court is satisfied that assets of a particular portfolio of an SPC are likely to be insufficient to discharge its debts in respect of that portfolio, a receiver may be appointed over that portfolio (per section 224(1) of The Act). Where a receivership order is made, a moratorium on claims against that particular portfolio arises, and no claims can be made against it without leave of the Court (per section 226(5) of The Act).

Finally, receivers can be appointed with no Court involvement, in accordance with rights arising under security instruments. I.e. the holder of a fixed/floating charge can appoint a receiver of the company's charged asset if a debtor is in default of its obligations, and provided that the security document provides for the appointment (e.g. Scotiabank (Cayman Islands) Limited v Treasure Islands Resort (Cayman) Limited [2004-2005 CILR 423]). The receivers powers are derived in those circumstances from the security documentation, and its duties are owed to the creditor appointing it, not the Court.

It is for each of those reasons stated above, that I vehemently disagree with the proposition included in the question.

Commented [BT7]: 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 across central America and the Caribbean. It was founded by the wealthy Rackham family over 40 years ago. The family continues to own and manage the business.

Between 2015 and 2019, VP had been rapidly expanding its operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to COVID-19 adversely affected its revenues.

VP has only managed to stay afloat for the past three years with the assistance of a very large loan from Blue Iguana Treasure Bank (BITB). BITB has lent VP USD 300 million (USD 180 million of which is secured by a mortgage over four of VP's largest party boats). The loan facility has now been exhausted. VP has also fallen behind on the monthly repayments to BITB.

This year, the tourism market picked up again; however, VP cannot afford to pay the ongoing costs associated with maintaining its fleet of ships (which include electricity and water costs for its huge dry dock facility, ongoing engineering and mechanical costs and also wages, pension and health insurance for its reduced team of employees) let alone find enough money to buy the vast quantities of rum it needs to keep the tourist customers suitably refreshed.

To make matters worse, VP commissioned Johnson & Boris Ltd (JoBo) to build seven more oversized party boats only a few months before the pandemic struck. VP attempted to wriggle out of the contract but, by virtue of an arbitration clause, the dispute was referred to the ICC sitting in London. Earlier this month, the ICC ruled that VP must pay damages of USD 50 million to JoBo within 45 days. VP has no prospect of being able to satisfy that award.

You are a Cayman Islands-based insolvency professional and have been approached to provide advice on the following:

- (a) What action can BITB take to protect its interests?**
- (b) What action can JoBo take to protect its interests?**
- (c) What action can the unpaid employees take against VP?**
- (d) Does the Cayman Islands Court have jurisdiction over VP?**
- (e) Is there a legal route via which VP can protect itself and seek to restructure?**
- (f) Following on from (e) above, can the Rackham family continue play a part in running VP during any restructuring process?**
- (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?**

(a) BITB is a creditor of VP. It is both a secured and unsecured creditor. In respect of the USD 300 million loan made, BITB could seek to enforce its secured interest by way of the mortgage over four of VP's largest party boats. Irrespective of any insolvency proceedings that are instituted, BITB is entitled to enforce its security interest (the USD 180 million) without leave of the Court and without reference to any such insolvency proceedings or any restructuring officer (section 91H of The Act) or liquidator (section 142 of The Act). Given the precarious financial state of VP, it is likely that the debt to BITB is worth more than the value of their security, they may prove in any liquidation for the unsecured balance - if that is the case, the proof of debt is submitted by the secured creditor stating the particulars of its security and value which they place on said security (Order 17, r 1 of the Companies Winding Up Rules). In respect of its unsecured portion of its loan, BITB (as creditor, section 94 of The Act) may file a winding up petition in respect of VP on the grounds that it is unable to pay its debts (section 92 of The Act).

Commented [BT8]: 3

(b) JoBo has several options to protect its interest: as an unsecured creditor of VP (section 94 of The Act), it may file a winding up petition in respect of VP on the grounds that it is unable to pay its debts (section 92 of The Act). As the Cayman Islands adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and has enacted domestic legislation for the recognition of foreign seated arbitrations (e.g. Foreign Arbitral Awards Enforcement Law (1997 Revision)), JoBo could make an application to the Grand Court seeking to enforce the foreign arbitral award as if it was a judgment of the Cayman Islands Grand Court - orders would then be made for the payment of the debt owed to JoBo. Once its debt goes unpaid in the jurisdiction, JoBo may also seek to have receivers appointed to enforce the Court order for payment of the USD 50 million it is owed (per Order 45 of the GCR).

Commented [BT9]: 2.5

(c) In an insolvency scenario, the unpaid employees are ranked as preferential debts (section 141 of The Act), which comprises the sums due to employees of VP. In terms of the priority in a liquidation, beyond secured creditors like BITB, the liquidation expenses are the first paid debts, followed by preferential debts, like the employee wages, taxes, sums due to depositors and unsecured debts not subject to subordination. These preferential debts are treated equally, and if insufficient capital exists to pay them out in full, their claims abate equally. If a liquidation of VP takes place, the employees can and probably will be required by the liquidators to provide statements of the company's affairs supported by affidavit (see section 101 of The Act and In the Matter of Saad Investments [2010 (2) CILR 422]).

Commented [BT10]: 1.5

(d) The Cayman Islands Grand Court likely has jurisdiction over VP. The Grand Court has jurisdiction over corporate liquidations and restructurings, and has jurisdiction to make orders in relation to companies that are, relevantly, incorporated in the Cayman Islands, or incorporated elsewhere and registered

in the Cayman Islands, or over foreign companies that have property in or are carrying on business in the Islands (section 91 of the Companies Act). Here, whilst the facts do not indicate whether VP is a Cayman Islands incorporated or foreign company, they do confirm that it is registered in the Cayman Islands, and also conducts business in the Islands and has assets (i.e. boats), so the Grand Court would very likely be found to have jurisdiction over VP.

Commented [BT11]: 1.5

(e) To protect itself and seek to restructure its operations, VP could seek the appointment of a Restructuring Officer ("RO") pursuant to Part V of The Act (sections 91A-J). VP is entitled to present a petition to the Grand Court for an RO appointment provided that it is or is likely to become unable to pay its debts and it intends to present a compromise or arrangement to creditors. The petition can be presented by the directors of VP without a resolution from shareholders, nor there being any express power arising from the company's articles. Protection arises via this process in the form of a moratorium on claims being made or persisting against VP, arising automatically on the filing of the RO application and having extraterritorial effect. Whilst protection is largely afforded to VP, secured creditors (like BITB, in part) remain able to enforce their security without leave of the Court or without accord to the RO.

Commented [BT12]: 2.5

(f) If VP successfully obtains the appointment of an RO, it is unclear whether and what role the Rackham family (existing management) will continue to have a role in managing the company once an RO is appointed. It has been shown recently (in In the matter of Oriente Group Limited - FSD 231 of 2022 (IKJ)) that the Grand Court will determine what powers of directors (if any) remain and those that will be vested in the RO, in the same way as the Grand Court does with provisional liquidation appointments.

Commented [BT13]: 1

(g) Before approving any proposed restructuring of VP, for example by way of a scheme of arrangement, is governed by Order 102, rule 20 of the GCR and Practice Direction 2/2010. There is a three stage process after filing of the petition for schemes:

a. In the application, an order must be sought for a meeting of creditors to be convened for the purpose of approving the scheme, i.e. the convening hearing. Details of the scheme are included in scheme documentation to be distributed to each scheme participant, as well as being advertised (once approved). At this hearing, the Grand Court must be satisfied that the scheme documentation provides all available information reasonably necessary for the scheme creditors to make an informed decision regarding the proposal.

b. The scheme proposal(s) are considered at meetings held pursuant to the convening hearing order and will result in an approval or rejection, i.e. the scheme meeting. For this creditor scheme, the scheme must be

approved by a majority in number (more than 50%) and at least 75% in value of creditors (section 86(2) of The Act).

c. If approval is obtained via the scheme meeting, an application is then made to the Grand Court for approval and or sanction of the scheme, i.e. the scheme hearing. If approved by the requisite majorities, the scheme requires sanction by the Court before becoming binding on all creditors, contributories and the company (section 86(2) of The Act).

In terms of approval during the above process, the Grand Court will concern itself with compliance with its convening orders, whether creditors are fairly represented and if the arrangement (taking into account alternatives) is one that an intelligent and honest member of the creditor class, acting for their own interest, might reasonably approve.

*** End of Assessment ***

Commented [BT14]: 2.5

Commented [BT15]: 14.5/15

Commented [BT16]: 44.5 OUT OF 50