



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 it is possible. If a creditor wishes to register its security over an asset in the Cayman Islands, it must register its security with the relevant public security registers that are centrally maintained. Once a creditor's security is registered on one of the public registers (according to the type of asset that is secured), third parties will be on notice of their security interest.

Commented [BT2]: 1 mark. Candidate fails to demonstrate knowledge of 5.3 Guidance Text.

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 Grand Court has powers to make orders in support of foreign insolvency proceedings pursuant to Part XVII of the Companies Act. Section 241 Companies Act sets out the relief the Grand Court can order to assist the foreign bankruptcy proceedings, including recognition of the foreign representative, staying enforcement of any judgment against the debtor and requiring examination of a person in possession of information relating to the business or affairs of the debtor. Whether such an order is made depends upon the Court exercising its discretion, and section 242 (1) Companies Act sets out the criteria governing the Court's exercise of its discretion.

Commented [BT3]: Correct. More detail needed please. 2.5 marks

Question 2.3 [maximum 3 marks]

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

*The Cayman Islands is not party to any international treaties for the reciprocal recognition or enforcement of foreign judgments. The legal framework is governed by statute and common law. The statutory regime is contained in The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) although that only applies if the judgment's originating country assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgment (per section 3(1)), and the provisions of the Act have only so far been applied to the Superior Courts of Australia. Under common law, the enforcement of a foreign judgment can be achieved by issuing a claim on the basis of an unsatisfied debt or other obligation, pursuant to the Grand Court Rules. *Bandone v Sol Properties 2008 CILR 301* case confirmed that in personam judgments may be recognised and enforced through equitable remedies or pursuant to the principle of comity.*

Commented [BT4]: 2.5 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.

Yes, there are some options available to the liquidators or creditors. Section 99 of the Companies Act provides that once a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void. For this purpose the date of commencement of the winding up is the filing of the petition rather than the date of the winding up order. Therefore, the liquidator or creditor can seek to have such a transaction set aside and have the value of the transaction paid back to the company or the asset in question returned.

*Liquidators or creditors also have rights of recourse against former directors if a transaction constitutes a voidable preference pursuant to section 145 Companies Act. Under that section, a payment or disposition of property to a creditor is voidable 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. To bring such an application to have the transaction set aside, the creditor or liquidator needs to demonstrate that the creditor in question has been placed in a better position than it would have been otherwise. It also needs to be shown that the placing of that creditor in a better position was the "dominant purpose", which can be inferred from certain circumstances such as if the transaction is entered into with a related party of the company. The test for this was considered and set out in *Re Weaving Macro Fixed Income Fund Ltd (in Liquidation)* the Cayman Islands Court of Appeal and Judicial Committee of the Privy Council.*

Finally, if a transaction is made at an undervalue, the creditor or liquidator can seek to have it set aside and the value paid back to the company or asset returned. Pursuant to section 146 Companies Act, a transaction is voidable if it was disposed of at an undervalue and with the intention of wilfully defeating an obligation owed to a creditor (that is, an intent to defraud). Such applications must be brought within 6 years of the date of the disposal of the property and the applicant has the burden of proof in proving that the intention of the transaction was to defraud the company's creditors. "Undervalue" means the provision of no consideration or a consideration which in money or money's worth is significantly less than the value of the property that was disposed of.

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.

Receivership is an option that is only available to secured creditors. Technically, secured creditors sit outside of an insolvency scenario since they are not obliged to participate in the insolvency processes and can take steps to enforce their security notwithstanding formal insolvency process being entered into. However, they provide such security holders with an alternative means of enforcing their interests without the need for Court involvement. Once appointed the receiver can take actions pursuant to the powers set out in the charge instrument which often includes the right of sale of the asset. Being able to take such action without the Court's involvement of supervision makes this option a more cost effective and quicker route for recovering its debt for secured creditors. Saving costs which will ultimately be borne by the company means there may be more of the debtor's other assets available (if any) to satisfy other creditors if a formal insolvency proceeding does become necessary. Receivers are also necessary in the event of a particular portfolio of a Segregated Portfolio Company falling into insolvency, as the usual winding up provisions would not be appropriate for a company of this nature. The receiver in that circumstance acts in a similar role to the liquidator and is responsible for the winding down of the business of the segregated portfolio and distribution of its assets to those who are entitled to it (per section 224(3) Companies Act.) Receivers therefore do have a role to play in a Cayman Islands insolvency scenario.

Commented [BT6]: Good, albeit not detailed. 4/6.

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?**
- (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 secured creditor in respect of USD 180 million of its debt. If the terms of the charge instrument allow it to, it could appoint receivers in respect of VP's four largest party boats and provided they have the power to do so under the terms of the charge, the receivers could exercise a power of sale and pay BITB some of its debt from the proceeds (after payment of their own remuneration). The balance of its debt is unsecured, and BITB could bring a petition for the winding up of VP and prove in the liquidation for that sum.

b) JoBo has the benefit of an arbitral award against VP from the ICC in London. It could commence a claim in the Financial Services Division of the Grand Court to enforce its arbitral award against VP. Order 73 of the Grand Court Rules requires that the parties must apply for leave to enforce an award by ex parte originating summons and it needs to bring its action within 6 years of the date of the arbitral award.

Commented [BT7]: 2.5

Commented [BT8]: 2

c) *The unpaid employees can prove in the liquidation as unsecured creditors and when the liquidator comes to distribute the assets they will rank as preferential debts per section 141 Companies Act.*

Commented [BT9]: 1.5

d) *Yes, as VP is a company registered in the Cayman Islands, the Court has jurisdiction over it.*

Commented [BT10]: 1

e) *Yes, VP can appoint a restructuring officer pursuant to Part V, section 91A-J of the Companies Act. VP needs to present a petition to the Grand Court for the appointment of a restructuring officer 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). When VP files the petition, a moratorium on creditor claims will automatically be triggered and its creditors wont be able to bring or continue claims without leave of the court. VP could also enter into a scheme of arrangement with its creditors, per section 86 of the Companies Act.*

Commented [BT11]: 2.5

f) *As was the case when provisional liquidators were the principle method of restructuring in Cayman Islands law, if a restructuring officer is appointed it is expected that the Grand Court will determine which powers will remain with the directors (if any) and which will be vested in the ROs. It depends on whether the Court considers that the way in which the company's affairs were being conducted was prejudicial to the company's creditors. The RO is an officer of the Court and owes its duties to the Court rather than the Rackhams, so if they consider that the Rackhams should no longer have a role in the running of VP they can apply to Court for their powers to be extended by way of a variation to their appointment order, per section 91E Companies Act.*

Commented [BT12]: 1

g) *Before approving the proposed restructuring, the Court will need to be satisfied that the proposed restructuring officer is a qualified insolvency practitioner (section 91D Companies Act). The Court also needs to be satisfied that VP is or is likely to become unable to pay its debts within the meaning of section 93; and intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to the Companies Act, the law of a foreign country or by way of a consensual restructuring.*

Commented [BT13]: Examiner was looking for factors such as the honest and intelligent investor test etc 1

Commented [BT14]: 11.5/15

*** End of Assessment ***

Commented [BT15]: TOTAL MARKS 38.5 OUT OF 50