



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

CAYMAN ISLANDS

This is the summative (formal) assessment ***for*** Module 5C ***of this course and must be submitted by all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 5C. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment5C]. An example would be something along the following lines: 202223-336.assessment5C. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 9 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Select the correct answer.

Once an application for a restructuring officer is filed:

- (a) No action may be commenced against the company without leave of the court.**
- (b) No existing action may be continued against the company without permission of the provisional liquidator.**
- (c) Legal proceedings may be commenced or continued against the company without leave of the court.**
- (d) No action may be commenced against the company.**

Question 1.2

Which of the following is not available to a debtor company in the Cayman Islands?

- (a) Appointment of a receiver.**
- (b) Court-supervised liquidation.**
- (c) Official liquidation.**
- (d) Deed of Company Arrangement.**

Question 1.3

Select the correct answer.

In a voluntary liquidation:

- (a) *The company may cease trading where it is necessary and beneficial to the liquidation.*
- (b) The company must cease trading except where it is necessary and beneficial to the liquidation.**
- (c) *The company must cease trading if it is necessary and beneficial to the liquidation.*
- (d) *The company may cease trading unless it is necessary and beneficial to the liquidation.*

Question 1.4

Select the correct answer.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

- (a) *A company incorporated in the Cayman Islands.*
- (b) *A company with property located in the Cayman Islands.*
- (c) *A company carrying on business in the Cayman Islands.*
- (d) Any of the above.**

Question 1.5

Select the correct answer.

In a provisional liquidation, the existing management:

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

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

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

Question 1.6

Select the correct answer.

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

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

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

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

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

Question 1.7

Select the correct answer.

Any payment or disposal of property to a creditor constitutes a voidable preference if:

(a) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

(b) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

(c) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

(d) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant

intention of the company's directors was to give the applicable creditor a preference over other creditors.

Question 1.8

Which of the following is not a preferential debt ranking equally with the other four?

- (a) Sums due to company employees.**
- (b) Taxes due to the Cayman Islands government.**
- (c) Amounts due to preferred shareholders.**
- (d) Sums due to depositors (if the company is a bank).**
- (e) Unsecured debts which are not subject to subordination agreements.**

Question 1.9

Select the incorrect statement.

A company may be wound up by the Grand Court if:

- (a) The company passes a special resolution requiring it to be wound up.**
- (b) The company does not commence business within a year of incorporation.**
- (c) The company is unable to pay its debts.**
- (d) The board of directors decides it is "just and equitable" for the company to be wound up.**
- (e) The company is carrying on regulated business in the Cayman Islands without a license.**

Question 1.10

Select the correct answer.

In order for a proposed creditor scheme of arrangement to be approved:

- (a) 50% or more representing 75% or more in value of the creditors must agree.**
- (b) 50% or more representing more than 75% of the creditors must agree.**
- (c) More than 50% representing more than 75% of the creditors must agree.**

(d) More than 50% representing 75% or more in value of the creditors must agree.

Commented [BT1]: 10/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

It is possible for a creditor to register its security over:

- 1. certain assets that are centrally maintained in the Cayman Islands, i.e. ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property; and*
- 2. assets of a debtor company, by entering a record in that company's register of mortgages and charges as maintained by that company's registered office in the Cayman Islands.*

Any such security can be registered pursuant to the relevant laws (in the case of (1)) or by notifying the debtor company's registered office (in the case of (2)).

The effect of registering security means that a third-party purchaser of the charged asset will be deemed to have notice of the registered interest, and will therefore acquire that asset subject to the security. Registration of security also gives that secured creditor priority over non-registered secured creditors (but not does not otherwise create priority).

Commented [BT2]: 3 marks

Question 2.2 [maximum 4 marks]

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

The Cayman Islands Grand Court does have the power to assist foreign bankruptcy proceedings. The source of power is in The Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 and Part XVII of the Companies Act.

Whilst the Cayman Islands has not implemented the UNCITRAL Model Law on Cross-Border Insolvency, most of the principles are followed by the Cayman Islands Grand Court in the interests of comity.

In order for the Grand Court to exercise its powers to assist foreign bankruptcy proceedings, the foreign representative must apply to the Grand Court and satisfy the Grand Court that it would be appropriate for the Grand Court to exercise its discretion

by granting the relief sought. There are otherwise no threshold tests for the grant of assistance, nor any automatic rights based on the COMI of the debtor.

Commented [BT3]: Question calls for reference to the criteria at s.242 - 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 has adopted a cooperative approach to cross-border cases. The legal framework for the recognition of foreign judgments in the Cayman Islands is as follows.

Treaties

The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments. In particular, the Cayman Islands is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

The United Kingdom has the power to extend its treaties to the Cayman Islands by virtue of the Cayman Islands' status as a British Overseas Territory. However, the United Kingdom has only extended the ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. Apart from this New York Convention, no other relevant treaties have been extended to the Cayman Islands by Order in Council.

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the "FJREA")

The Cayman Islands has enacted the FRJEA, which provides for a statutory scheme for the recognition and enforcement of foreign judgments. However, the FRJEA only applies to countries from which the judgment originates assures substantial reciprocity of treatment. To date, the FJREA has only been extended to judgments from the Superior Courts of Australia.

In relation to foreign judgments amenable to the FRJEA, that foreign judgment must be (a) final; (b) a money judgment; and (c) made after the FJREA was extended to the relevant foreign country.

Common law

Money and non-money judgments (including declaratory judgments) are enforceable in the Cayman Islands pursuant to common law. This requires the applicant to commence a new action in the Cayman Islands based upon that foreign judgment either as an unsatisfied debt or some other obligation. In order for such an action to succeed, the applicant must satisfy the Grand Court that:

1. *the foreign judgment is final;*
2. *the foreign court had jurisdiction over the debtor;*
3. *the foreign judgment was not obtained by fraud;*
4. *the foreign judgment is not contrary to public policy in the Cayman Islands; and*
5. *the foreign judgment was not obtained contrary to the rules of natural justice.*

Once a local judgment has been obtained, the judgment creditor will be entitled to enforce that judgment debt with the benefit of the full range of domestic enforcement remedies in the Cayman Islands, including the appointment of receivers.

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.

It is possible for court appointed liquidators of an insolvent company to hold the company's former directors accountable by either seeking financial damages against those directors and/or by seeking to claw back payments that those directors should not have made. These options are set out below.

Avoidance of property dispositions after the deemed commencement of the winding up - section 99 of the Companies Act

Pursuant to section 99 of the Companies Act, any disposition of a company's property made after the deemed commencement of the winding up (being the date of filing the winding up petition) will be void, if a winding up order is subsequently made and the disposition is not validated by the Grand Court.

In such circumstances, the liquidator is entitled to apply for appropriate relief (whether the repayment of funds or the return of the asset) on the basis that the disposition was void.

Voidable preference - section 145 of the Companies Act

Any payment or disposal of property to a creditor (the "Transfer") constitutes a voidable preference pursuant to section 145 of the Companies Act if:

1. *the Transfer occurs in the six months before the deemed commencement of the company's liquidation; and*
2. *the company was unable to pay its debts; and*

3. *the dominant intention of the company's directors in making the Transfer was to give the applicable creditor a preference over other creditors (i.e. to put that creditor in a better position than it otherwise would have been).*

Element 3 is usually the most controversial. In particular, if the dominant intention of the company's directors was to achieve a different purpose (e.g. a good faith payment of an essential service provider), then the Transfer might not be determined to be a voidable transaction, even if that creditor ends up being placed in a better position than it otherwise would have been. Liquidators seeking to rely on section 145 of the Companies Act will need sufficient evidence for the Grand Court to infer the requisite dominant intention.

Section 145(2) also stipulates that if the Transaction is to a "related party" (defined in section 145(3) as being a creditor which has the ability to control the company or exercise significant influence), then the Transaction will be deemed to have been made with a view to giving a preference.

In such circumstances, the liquidator can make an application to the Grand Court to order the creditor to return the assets provided by the Transaction and for the creditor to prove its debts in the liquidation for the amount of the claim.

Dispositions at an undervalue – section 146 of the Companies Act

Pursuant to section 146 of the Companies Act, any disposition of property made:

1. *at an undervalue, which is defined as the provision of (i) no consideration; or (ii) consideration which, in money or money's worth, is significantly less than the value of the property; and*
2. *with the intention of wilfully defeating an obligation owed to a creditor,*
is voidable on the application of the liquidator.

The burden of proof rests on the liquidator to establish an intent to defraud.

Unlike a voidable preference claim, which has a narrow time period, a claim under section 146 must be brought within six years of the impugned disposal.

Fraudulent trading – section 147 of the Companies Act

Section 147 of the Companies Act provides that, if the business of the insolvent company was carried on with intent to defraud creditors, or for any fraudulent purpose, then the liquidator may apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company's assets as the Grand Court thinks proper.

This is different to a strict clawback of assets, but instead requires "contributions" from any such persons deemed by the Grand Court to have been knowing parties to the fraudulent trading.

Breach of directors' duties

It may also be possible for a liquidator to commence an action on behalf of the company on the basis that the directors have breached fiduciary duties owed to the company. This will ultimately be a fact specific exercise, but could also result in recoveries for the benefit of the company.

The above remedies are to be brought by the liquidator of the company and/or on behalf of the company. It would be unusual for a creditor of a company to have standing to bring any of these remedies in that capacity.

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Question 3.2 [maximum 6 marks]

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

Receivers may be appointed by the Grand Court pursuant to Orders 30 or 45 of the Grand Court Rules for the purposes of collecting money (such as rents) or to carry out a certain act, including the enforcement of court orders for the payment of money.

Whilst there is provision for the appointment of receivers in the Grand Court Rules, there is no express mention of receivers for ordinary companies in the insolvency legislative framework in the Cayman Islands (i.e. the Companies Act and the Companies Winding Up Rules). It is likely that this is because either a liquidator (whether provisional or official) or restructuring officer would be able to carry out a broad range of acts, including anything a receiver could do. In addition, the appointment of liquidators or restructuring officers also give additional benefits to the company that unavailable to receivers, such as a moratorium against claims and specific clawback remedies (in the case of liquidators). In these circumstances, there do not appear to be an ordinary situation whereby an applicant would seek the appointment of receivers, when it could appoint a liquidator / restructuring officer instead.

However, receivers have an integral role to play in the context of segregated portfolio companies ("SPCs"). SPCs are a particular type of corporate entity in the Cayman Islands, which allow the creation of separate portfolios that ring-fence assets and liabilities whilst still remaining a single legal entity. Section 224 of the Companies Act provides that the Grand Court can appoint receivers over individual segregated portfolios (as opposed to the appointment of a liquidator, who would have to be appointed over the entire SPC) that are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio. A receiver in this context acts similar to a liquidator in respect of that segregated portfolio, and also has the benefit

of a statutory moratorium (pursuant to section 226(5) of the Companies Act) just like a liquidator would.

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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 is a creditor of VP in the amount of:

- 1. US\$180 million as secured creditor (the "Secured BITB Loan"); and**
- 2. US\$120 million as unsecured creditor (the "Unsecured BITB Loan").**

In relation to the Secured BITB Loan, in the event of non-payment, then BITB is able to exercise its rights as a secured creditor without the leave of the Grand Court and without reference to any appointed liquidator (as to which, see below).

In relation to the Unsecured BITB Loan, in the event of non-payment, BITB would be able to bring a winding up petition against VP on the basis that VP is unable to pay its debts pursuant to section 92 of the Companies Act. VP would be deemed to be unable to pay its debts pursuant to section 93 of the Companies Act if:

- a. BITB serves a statutory demand for the Unsecured BITB Loan, which VP fails to pay 21 days after service;*
- b. BITB executes a process issued on a judgment, decree or order obtained in the Grand Court by BITB, which is returned unsatisfied in whole or in part; or*
- c. It is provided to the satisfaction of the Grand Court that VP is unable to pay its debts.*

Upon the appointment of an official liquidator, BITB would be able to prove the debts owed to it in the liquidation, including the Unsecured BITB Loan, as well as any shortfall in the Secured BITB Loan arising from a shortfall in the realisation of the security.

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

JoBo presently has a foreign arbitral award, which it will need to enforce in the Cayman Islands. The New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards applies in the Cayman Islands by virtue of the United Kingdom extending its ratification to the Cayman Islands. JoBo will need to do this pursuant to the Foreign Arbitral Awards Enforcement Act in the Cayman Islands.

Once JoBo has a legally enforceable judgment debt in the Cayman Islands, it can seek to enforce that debt against VP in the Grand Court. If VP fails to pay the judgment debt, then JoBo can seek to wind up VP under section 92 of the Companies Act on the basis that VP is unable to pay its debts pursuant to section 93 of the Companies Act.

Upon the appointment of an official liquidator, JoBo would be able to prove its debts in the liquidation as an unsecured creditor.

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

Sums due to employees are deemed to be preferential debts pursuant to section 141 of, and Schedule 2 to, the Companies Act. As a result, these sums (and all other preferential debts) would be paid in priority to all other debts.

By virtue of being a creditor, an unpaid employee can conceptually also bring a winding up petition. However, it may be more desirable for the unpaid employee to wait for VP to be put into liquidation by VP's larger, commercial creditors, and then be paid preferentially in the liquidation.

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

Section 91 of the Companies Act provides that the Grand Court has jurisdiction to make orders in respect of:

Commented [BT10]: 1.5

- (a) companies incorporated in the Cayman Islands; or*
- (b) companies incorporated elsewhere but subsequently registered in the Cayman Islands; or*
- (c) a foreign company, which:
 - a. has property located in the Cayman Islands;*
 - b. is carrying on business in the Cayman Islands;*
 - c. is the general partner of a limited partnership; or*
 - d. is an "overseas company".**

Because VP is registered in the Cayman Islands, the Grand Court will have jurisdiction over it.

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

VP can protect itself by utilising the 'restructuring officer' regime in the Cayman Islands pursuant to sections 91A-J of the Companies Act (the "RO Regime"). The RO Regime is akin to the Chapter 11 bankruptcy procedure in the United States or an English administration.

VP is able to present a petition to the Grand Court to appoint restructuring officers on the grounds that:

- 1. It is or is likely to become unable to pay its debts; and*
- 2. It intends to present a compromise or arrangement to its creditor (or classes of creditors).*

Precondition (1) is clearly met. VP will then need to provide sufficient evidence to the Grand Court to satisfy precondition (2) that it intends to present a compromise or arrangement.

Upon the filing of the petition for the appointment of restructuring officers, VP will enjoy the benefit of an automatic moratorium, such that no suit, action or other proceedings (both domestic and foreign) may be initiated or proceeded with, without the leave of the Grand Court. The moratorium has extraterritorial effect, but does not circumscribe the usual rights of secured creditors (such as the Secured BITB Loan owed to BITB).

Once heard and relief granted, the Grand Court will appoint a restructuring officer over VP to facilitate the restructuring.

In urgent cases, a restructuring officer may be appointed on an interim basis (pending hearing of the petition).

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

This will ultimately be determined by the scope of the Grand Court's order appointing the restructuring officer. The RO Regime draws many parallels from the previous provisional liquidation regime in the Cayman Islands. Given that there appears to be no allegations of wrongdoing on behalf of VP, it is likely that the restructuring officer would be working in tandem - rather than displacing - the board of VP, to achieve a restructuring for the benefit of VP's creditors.

Commented [BT12]: 1

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

The factors the Grand Court will take into consideration before approving any proposed restructuring will depend on the type of restructuring being effected.

If the restructuring is in support of a foreign restructuring proceeding (e.g. a Chapter 11 in the United States), then the restructuring plan will be substantively approved in that foreign jurisdiction (e.g. the US bankruptcy court confirming the plan of restructuring). The Grand Court's considerations in these circumstances would be to support that foreign restructuring.

If the restructuring is to be effected in the Cayman Islands by way of a formal process, such as a scheme of arrangement, then there are statutory requirements that need to be met. In the case of a creditor scheme of arrangement, the procedure is set out in Order 102, rule 20 of the Grand Court Rules and Practice Direction 2/2010. For example, at the scheme meeting for a proposed creditor scheme, a majority in number (i.e. over 50%) representing at least 75% in value

of creditors (or class of creditors), present and voting either in person or by proxy, must agree to the compromise or arrangement. Once all statutory requirements are complied with, the Grand Court will consider the following factors before sanctioning the scheme of arrangement:

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

Commented [BT13]: 2.5

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Commented [BT15]: TOTAL MARKS 46/50

*** End of Assessment ***