



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.**

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

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.**

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

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.*

Commented [BT3]: Incorrect. Answer was (b)

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.**

Commented [BT4]: Incorrect. Answer was (d)

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 [BT5]: 6/10

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?**

Answer

It is possible for a creditor to register a security over real estate, ships, aircrafts, motor vehicles and intellectual property in an ownership register but there is no public security registration regime in the Cayman islands for other types of assets.

A creditor must take the necessary and relevant steps, well in advance to ascertain whether a particular asset is already encumbered and to ensure that it has sufficient control over an asset to prevent a third party to purchase it. In terms of section 54 of the Companies Act it is required that security interests be entered in the register of mortgages and charges of the debtor company and for the register to be maintained.

The effect of registering a security interest in the company's register means that the register is open for inspection by any member of the company or creditor therefore placing third parties on notice of the existence of a security recorded in their register however it does not create a priority. In the event of conflict, the relevant law governing the priority and perfection of security interest will be determined by the location of the asset.

**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 is considered to be a creditor-friendly Island to attract international business. As the Cayman Islands is regarded as the leading financial centre for international business most liquidations involve cross-border issues. The Grand Court's powers to make orders in support of foreign insolvency proceedings, are provided for in the Companies Act Part XVII. Although there is no threshold test for the grant of assistance, or automatic rights based on the COMI of the debtor, foreign representatives must satisfy the Grant Court that it is appropriate for the court to exercise its discretion by granting the relief sought in an application made by a foreign representative. The UNCITRAL Model Law on Cross-Border Insolvency has not been implemented by the Islands but most of the principles are followed. The Cayman Islands is not a member of the EU and therefore EU legislation does not apply.

**Question 2.3 [maximum 3 marks]**

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

The framework entails treaties, Statutes and common Law.

The legal framework for the recognition of foreign judgments is found in the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) but only where the country from which the judgement originates guarantees considerable reciprocity of treatment vis-à-vis the enforcement of Cayman Islands Judgements. The provisions of the Act have been extended

**Commented [BT6]:** 2 marks. What is the effect of registering centrally? 3rd party notice? Priority?

**Commented [BT7]:** Question calls for criterion at s.242 Companies Act - 1.5 marks.



to judgments from the Superior Courts of Australia and the procedure is governed by Order 71 of the Grand Court Rules

Although treaties form part of the framework for the recognition of foreign judgments the Cayman Islands has not entered into any international treaties and the UK has not extended its ratification of any such treaties however the UK has the power to extend treaties because the Cayman Islands is a British Overseas Territory.

In order to enforce foreign judgments a new action must be brought in the Cayman Islands based upon the foreign judgment which are conducted under the regular procedural regime for litigation which is the Grand Court Rules. There is a 6-year limitation period which applies both for common law enforcement and under the 1996 Act.

Commented [BT8]: 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.***

Answer

The statement that Cayman Island law does not *by statute* prohibit insolvent trading per se is correct. However, the duties and liabilities of directors of such companies is a separate question.

The duties and liabilities of directors of companies in the Cayman Islands are determined by statute in the Companies Law (as amended) and by the Common Law from which precedents are formed. Some of the Common Law principles have been incorporated into the legislation.

In the Companies Law revision of 2011, particular provision is made to hold directors civilly liable concerning fraudulent trading (per section 147) committed in anticipation of the winding up of a company. Section 147 empowers a *liquidator* (note: not a creditor) to apply to court for a declarator “where it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose.” Under section 147, the court may declare a person who was knowingly party to such fraud “liable to make contributions to the company’s assets”.

I conclude that the Companies Act does thus permit the court-appointed liquidator (not the shareholders) to seek an order that the infringing directors “make contribution to the company’s assets”, (which, it seems, is another way of saying that financial damages can be claimed for the directors) in respect of fraudulent behaviour in the context of the winding up of the company. However, the legislation does not provide that the directors are civilly liable for their fraudulent or reckless conduct during the normal course of business.

Turning to the common law, the Cayman Islands legal system relies heavily on the English common law. Several common law duties are imposed on directors such as fiduciary, skill,

care and diligence. In *Renova Resources Private Equity Ltd v Gilbertson* 2009 CILR 268, the court confirmed that these duties entail that a company director in the Cayman Islands must act in good faith and in the best interests of the company in all his company dealings and exercise his powers in the company's interests. There is a duty to declare personal interest in company contracts; a duty not to make secret profits from his position as director; a duty of honesty and loyalty to the company. The Grand Court of the Cayman Islands applies an objective test in assessing the conduct of a company director – i.e. the skill and knowledge and experience that is reasonably expected of a person in that position in conjunction with the general knowledge, skill and experience that the director actually has.

As a general statement, directors are not personally liable for the debts, obligations, or liabilities of a company except for those which arise out of negligence, fraud or breach of fiduciary duty by an individual director, or due to an action not within his authority and not ratified by the company. That said, statutory liability may arise by order of the Court on the winding up of the company or under the fraudulent trading provisions. Under section 147 of the Companies Law, the Court may order a director who was knowingly party to fraudulent trading by the company to make contribution to the company's assets.

Accordingly, apart from the ability to seek an order that hold former directors contribute to the company's assets, a tort (delictual) liability arises from the director's negligence and breach of duty by trading under insolvent circumstances well knowing or when the director ought reasonably to have known that the company cannot repay its debts or has made payments which place the company into insolvent circumstances.

**Commented [BT9]:** Don't forget sections 99, 145 and 146. 6/9.

### Question 3.2 [maximum 6 marks]

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

#### Answer

I do not agree fully with the statement above. Although the appointment of a receiver is not available for a debtor's company in the Cayman Islands a receiver is available to creditors to assist in a wide range of duties. A receiver can be appointed by a secured creditor to realize real property or enforce security rights.

When a judgement has been obtained against a debtor and his goods have been taken into execution, but the bailiff has not executed the process and he receive a notice of the appointment of receiver under a bankruptcy petition, the bailiff must deliver such goods to the receiver.

A court appointed receiver in terms of Order 30 of the Grant Court Rules which governs the appointment and duties of the receivers can be used to collect money in terms of Order 45 GCR, or to carry out some other act as stipulated by Court.

Although the appointment of Receivers is not explicitly mentioned in the statutory provisions, they can be appointed to deal specifically with insolvency matters in terms of the Companies Act and Companies Winding up Rules.

**Commented [BT10]:** Ok, but what about other scenarios eg SPCs? 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?***
- (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?**

Answer

- (a) BTIB ought to immediately *register* the mortgage it holds over the four party boats as security for payment of USD180 million. In terms of Cayman Island law, a mortgage over movable property must be perfected – ie. registered – before the creditor's claim will be regard as a secured claim. For the portion of the loan secured by the (by now registered) mortgage, BTIB can institute action in the Cayman Island courts despite a petition for appointment of a restructuring officer having been filed. For the balance of USD 120 million, BTIB is simply an unsecured creditor able to exercise its limited rights as **such**.
- (b) JoBo is in possession of an award granted by an arbitrator in the UK At present, a foreign judgment obtained in the UK cannot be enforced in the Cayman Islands (due to absence of a reciprocity agreement). At common law, JoBo may institute action based on the debt, being the award made by the arbitrator but is prohibited from doing so once a petition for restructuring is **filed**.
- (c) The employees can file claims against VP with the restructuring officer and will enjoy the status of preferential creditors in a winding **up**.
- (d) The Cayman Island courts have jurisdiction over VP by virtue of it being registered as a company under Cayman Islands **law**.
- (e) VP can protect itself by petitioning the Grand Court for the appointment of a restructuring officer stating that is unable or is likely to become unable to pay its debts and that that is intends to present a compromise or arrangement to its creditors. The effect is that an automatic moratorium against any suit or action against it or its assets is granted as from the date on which the petition was filed. While the moratorium includes extraterritorial judgments and awards such as the award BoJo obtained In London at the ICC, secured creditors such as BTIB can continue to institute action as a secured creditor (but only for the secured portion) without first obtaining the leave of the restructuring officer or the **court**.
- (f) The Rackham family will probably be able to continue to manage the business in conjunction with the court-appointed restructuring officer. Although the restructuring officer regime is a new one, it is likely that the Cayman Island “light touch” approach (which allows the existing owners and managers to continue to run the business) will **prevail**.
- (g) Order 102, Rule 20 of the Grand Court Rules provides that the Grand Court can approve a scheme of arrangement (which is how restructuring take place) after a scheme petition is filed. Schemes of arrangements in the Cayman Islands require two hearings, the first is a convening hearing to approve the manner of the scheme meeting at which creditors vote on the scheme of arrangement and communication to the creditors in relation to voting and the second a sanction hearing to assess the results of the voting at the scheme meeting and to consider whether the outcome of the vote should be sanctioned by the Court and become binding on all creditors, including those who voted against it.. The six requirements which the court will take into account when sanctioning a restructuring are:

Commented [BT11]: 1.5

Commented [BT12]: It can be recognized and enforced. Check study guide for information.

Commented [BT13]: 1

Commented [BT14]: 1

Commented [BT15]: 1.5

Commented [BT16]: .5

- a. the proposed scheme fell within the parameters of the Companies Act;
- b. the Scheme Document provided all material information reasonably required to enable the scheme shareholders to come to an informed view on the merits of the scheme;
- c. the Court ordered meetings were properly held and the required statutory majorities were achieved;
- d. there was no reason to believe that the views of the majority voting in favour of the scheme did not fairly represent the views of the scheme shareholders as a whole or that they were not acting *bona fide* or subject to coercion;
- e. the scheme is fair in the sense that an intelligent and honest person acting in respect of their relevant interest might approve of it; and
- f. there was no good reason for the Court to not exercise its residual discretion in sanctioning the scheme.

**Commented [BT17]:** 1.5

**Commented [BT18]:** 7/15. Re-reading of study guide recommended to reinforce knowledge.

**Commented [BT19]:** TOTAL MARKS 28/50

**\* End of Assessment \***