



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?

In accordance with Section 142 of the Companies Act, secured creditors are not prohibited from enforcing their security even during an automatic stay. Furthermore, the Cayman Islands does allow for registering mortgages and charges in a centrally maintained ownership registers for real estate, ships, aircraft, motor vehicle and intellectual property.

Section 54 of the Companies Act details that the security interest must be entered in the register of the mortgages and charges of the debtor company and maintained at the Company's registered office in the Caymans Islands.

While "registration" gives a secured creditor priority over non-registered creditors, registering a security interest in the company's register of mortgages and charges does not create priority. However, as the register is open for inspection by any member of the company or creditor one of the effects is that it puts third parties on notices of the existence of a security recorded.

Commented [BT2]: Decent answer but lacking detail. Re-read 5.3 guidance text. 2 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. While the Cayman Islands has not implemented the UNCITRAL Model Law, regard is still had to its principles. Therefore, Part XVII of the Companies Act outlines the Grand Court's powers for international cooperation.

More specifically, section 241 explains the power the Grand Court has to provide ancillary orders. The purposes of ancillary orders are as follows:

- (a) recognising the right of a foreign representative to act in the Islands on behalf of, or in the name of, a debtor;*
- (b) enjoying the commencement or staying the continuation of legal proceedings against a debtor;*
- (c) staying the enforcement of any judgment against a debtor;*
- (d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and to produce documents to its foreign representative; and*
- (e) ordering the hand-over to a foreign representative of any property belonging to a debtor.*

Furthermore, section 242 explains the criteria upon which The Grand Court's discretions shall be exercised. The court is guided by matters which will best assure an

economic and expeditious administration of the debtor's estate. More specifically, the court ensures the ancillary orders are consistent with:

- (a) the just treatment of all holders of claims against or interest in a debtor's estate wherever they are domiciled,*
- (b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in foreign proceeding;*
- (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate.*
- (d) the distribution of the estate among creditors substantially in accordance with the statutory order prescribed by Part V;*
- (e) the recognition and enforcement of security interests created by the debtor;*
- (f) the non-enforcement of foreign taxes, fines and penalties; and*
- (g) comity.*

Commented [BT3]: 4 marks

Question 2.3 [maximum 3 marks]

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

While the Grand Court adopts a co-operative approach to ensure an effective wind up and to protect creditor interest, the Cayman Islands hasn't entered any international treaties for the reciprocal recognition of foreign judgments.

The statute that provides for the recognition and enforcement of foreign judgement is the Foreign Judgment Reciprocal Enforcement Act (1996 Revision) but it is limited solely to countries where the judgment originates assures substantial reciprocity of treatment of enforcement of Cayman Islands judgments.

Due to the limited application of the Act the enforcement of foreign judgments is typically achieved by commencing a new action in the Cayman Islands based upon the foreign judgement as an unsatisfied debt or other judgment under The Grand Court Rules which is subject to common law. Therefore, under common law there are 5 requirements for enforcement of a foreign judgement:

- (1) the 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 of the Cayman Islands; and*
- (5) the foreign judgment was not obtained contrary to the rules of natural justice.*

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.

Court appointed liquidators of an insolvent company have the power to claw back any payments or seek the return of assets that the Company’s directors should not have made/disposed on behalf of the company despite a statutory prohibition on insolvent trading in the following circumstances:

a) Voidable preferences pursuant to section 145 of the Companies Act

Any payment or disposal of property to a creditor occurring six-months before the liquidation commence while the company was unable to pay its debts in order to provide the respective creditor(s) preference over other creditors.

b) Avoidance of dispositions made at an undervalue pursuant to section 146 of the Companies Act

Any transaction in which property was disposed at an undervalue with the intention of defeating an obligation to a creditor is voidable on application of the liquidator. This application must be brought within six years of the disposal.

c) Fraudulent trading pursuant to section 147 of the Companies Act

Any business of the Company that was carried out with the intent to defraud creditor or any other fraudulent purpose. Any person(s) party to the conduct would be required to make contribution to the Company’s assets that the court deems proper.

Despite the Companies Act silence on wrongful trading the liquidator can seek to hold its former directors personally accountable for any losses cause by breaching their fiduciary duties by either seeking financial damages against those directors in the name of the Company. Prospect Properties v McNeil provides a perfect example case of a Company insolvently trading against the best interest of the creditors.

Commented [BT5]: A little too concise but good. 7/9.

Question 3.2 [maximum 6 marks]

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

Receivers are deemed to have no role to play in a Cayman Islands insolvency namely because their absence in the statutory provisions dealing with insolvency of the Companies Act and Companies Winding Up Rules and the cessation of any powers upon the commencement of the wind-up of a Segregated Portfolio Company. Receiverships main relevance in an insolvency context is that it offers an alternative course of action for certain powers.

The Grand Court Rules ("GCR") contemplates that receivers may be appointed by the Grand Court for the purpose of collecting money or to carry out other acts.

Order 30 GCR governs the appointment and duties of a receiver. Order 45 of the GCR allows for receivers to be appointed to enforce court order for the payment of money. Order 51 of the GCR provides for the appointment of receivers by way of equitable execution.

Receivers and receivership orders are specifically provided for statute in respect of a Segregated Portfolio Company as it is a type of Cayman Islands legal entity.

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?

Commented [BT6]: Fair but lacking in detail 3/6

(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 has a number of options to protect its interest, namely the following:
- i. As a secured creditor (180 million in value related to the VP's four largest party boats) can enforce their security on the assets in accordance with section 142 of the Companies act; and
 - ii. As Vegan Patty Inc (VP) is unable to pay its debts in accordance with Section 92 of the Companies act BITB can petition for the windup of VP.
- b) As JoBo obtained a judgement for VP to pay damages of USD 50 million they should seek the recognition of the foreign judgement in the Cayman Islands as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows for the recognition and enforcement of their order received.
- c) The unpaid employees can seek to sue VP for the amount of any unpaid wages. Additionally, under section 94 of the Companies act the unpaid employees meet the definition of a creditor and can seek the windup of VP, along with the other creditors, and seek priority preferential debt payment in accordance with section 141 of the Companies act.
- d) The Cayman Islands Court does have jurisdiction over VP as it is a company registered in the Cayman Islands.
- e) Section 104(3) allows for debtors to obtain breathing space needed for restricting via a provision liquidation as it allows an automatic stay, negotiation and compromise with creditors, and the opportunity to obtain a scheme of arrangement.
- f) The Rackham family continued role in running VP during the proposed provisional liquidation will be contingent on the powers of the liquidators and any clauses presented in the Court order received. For example, if provisional liquidators were appointed to prevent mismanagement then the Family will have no powers, but there are scenarios were the Family can retain participation.
- g) Before the Cayman Islands court approving any proposed restructuring, they will take into consideration the following factors:
- i. Determining any role, if any, existing management will have in managing the company

Commented [BT7]: 2.5

Commented [BT8]: 2

Commented [BT9]: 1.5

Commented [BT10]: 1

Commented [BT11]: 1. But also the appointment of CRO? Scheme?

Commented [BT12]: 1

- ii. *The procedure for obtaining approval for a scheme was done in accordance with order 102 rule 20 of the GCR and Practice Direction 2/2010*
- iii. *Having a convening hearing to determine whether any issues related to class composition, jurisdiction, scheme documentation, and notice.*
- iv. *Whether a majority in number (50%) representing at least 75% in value of the creditors present and voting agree to the compromise or arrangement*
- v. *Whether the arrangement after viewing all alternatives is intelligent that honest member of the class convened, acting in their own interest, might reasonably approve.*

*** End of Assessment ***

Commented [BT13]: 2.5

Commented [BT14]: 11.5. Good but a little more time and attention, with citation of law, would have gained more marks.

Commented [BT15]: TOTAL MARKS 40.50/50