



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.

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

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 [BT2]: 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.**

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

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 [BT4]: 7/10

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, creditors can register its security over an asset in the Cayman Islands but only over real estate, ships, aircraft, motor vehicles and intellectual property, as required by Companies Act Article 54. Cayman has ownership registers that are centrally maintained. In regard to other types of assets, there is no public security registration in Cayman Islands.

Registry of the security aims to publicize the act so that third parties acquiring such asset will be deemed to have notice of the encumbrances over the target asset and subject to secured creditor's interests. Further, registration of the security gives the creditor priority over non-registered securities.

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, Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings under the provisions of Part XVII of the Companies Act.

Despite the fact that Cayman Islands did not adopt UNCITRAL nor the EIR Recast is applicable, it tends to follow the principles of the model law in the interests of comity. Also, Cayman Islands is creditor friendly and adopts the universalism approach rather than territorialism.

Foreign representatives requesting the recognition of a foreign insolvency proceedings shall demonstrate to the Cayman Islands court that it is appropriate for such court to grant, at its discretion, the relief requested. It is worth to highlight that there is no threshold, nor the concession of an automatic stay grounded on the debtor's COMI location.

Following the foreign representative request for recognition of the foreign insolvency proceeding, Cayman Islands courts may recognise the rights of the foreign representative to act within Cayman territory on behalf or in the name of the debtor; stay the commencement or the continuation of proceedings against debtor; staying the enforcement of any judgement rendered against debtor; requesting information to a person in possession relating to the business affairs to be examined by and to produce documents to its foreign representative; and order the hand-over to a foreign representative of any property belonging to a debtor.

Despite relying on courts' discretion, when rendering a decision on the recognition matter, Cayman Island Courts shall observe the just treatment of holders, wherever their domicile is; protection of holders in the Cayman Islands against prejudice and

Commented [BT5]: Answer is somewhat confused - suggest re-reading 5.3 guidance text. 1.5 marks.

inconvenience in the processing of claims in foreign proceedings; prevention of preferential or fraudulent dispositions of property in debtor's estate; distributions of the estate proceeds among creditors, in accordance with statutory order of priority; recognition of enforcement of security interests created by debtor; non-enforcement of foreign taxes, fines and penalties; and comity.

Commented [BT6]: Reference to s.242 and 'best assure an economic and expeditious etc.' need for full marks - 3 marks.

At last, Cayman Islands does not provide for protocols with foreign courts, but legislation provides that official liquidators within the jurisdiction shall enter into international protocols with foreign officeholders to promote the orderly administration of estate of a company under official liquidation, avoidance of duplicate work and conflict between official liquidators.

Question 2.3 [maximum 3 marks]

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

Cayman Islands is not a party to any international treaties concerning the recognition of foreign judgements. Therefore, the recognition of foreign judgements in the Cayman Islands relies on cooperation and comity to protect creditors' interests.

Further, Cayman Island has statutory regulation governing the recognition of foreign judgements, the Foreign Judgement Reciprocal Enforcement Act (1996 Revision). However, the application of such Foreign Judgement Reciprocal Enforcement Act (1996 Revision) shall only occur when the other country assures substantial reciprocity of treatment by also recognizing and enforcing Cayman Islands judgements, which until now only applies to the Superior Courts of Australia.

Recognition of a foreign judgement under Foreign Judgement Reciprocal Enforcement Act (1996 Revision) the foreign judgement demands that the foreign judgement is final, liquid and rendered after the 1996 Act was extended to the foreign country in regard.

In view of the limited application of the Foreign Judgement Reciprocal Enforcement Act (1996 Revision), one could file for a civil action under Cayman Islands jurisdiction regarding the foreign judgement rendered by foreign courts (both involving liquid or not liquid decisions). The action filed will follow Grand Court rules (regular procedure under Caymans Islands Law) and requires that the foreign judgement is final, foreign court had jurisdiction over debtor, the decision was not rendered under fraudulent means, foreign judgement follows Cayman Islands public policy, and the foreign judgment is not contrary to rules of natural justice. Once the foreign judgement is recognized, all means to enforce the decision available under Cayman Islands Law may apply.

Commented [BT7]: 3 marks

It is also worth to highlight that for both the recognition under Foreign Judgement Reciprocal Enforcement Act (1996 Revision) or under regular litigation proceeding are

subject to a six-year statute of limitations counted from the date of the judgement or the final decision on the appeals that follow such judgement.

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.

According to Section 99 of the Companies Act, after the commencement of the wind-up, all transfers and disposition of assets will be deemed void, being the liquidator can request that the amounts disbursed, or assets transferred are reimbursed/returned to the estate.

Transfer of assets undertaken within 6 months prior to the commencement of a liquidation proceeding is to be deemed void if, at the time, debtor was already unable to pay its creditors and the transfer was undertaken with the intent of preferring one creditor over the remaining ones, as per Section 145 of the Companies Act.

Further, as per Section 146 of the Companies Act, the undervalued disposal of assets with the intention to defat a creditors claim can also be rendered void, if requested within 6 years of the disposal.

Also, transactions entered into with the intent to defraud creditors may imply on the obligation of the parties involved to reimburse/return company's assets.

Considering a scenario of absence of a statutory prohibition on insolvent trading, it would still be possible for court appointed liquidators of an insolvent company or creditors to hold its former directors accountable in regard to payments such directors should not have made, under breach of fiduciary duty since they would not have acted in the best interest of the company.

The action aiming to render the director accountable for the wrongful transfer acts and seeking the claw-back of the amounts disbursed shall be filed accordingly to the regular litigation procedure and shall follow the Grand Court rules.

Question 3.2 [maximum 6 marks]

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

Commented [BT8]: Good although more detail (e.g. case law) would have secured more marks. 7/9

Despite receivers being mostly used outside an insolvency proceeding scenarios to assess, collect and sell assets of debtors under creditors' orders, receivers also play an important role in insolvency proceedings context.

Alike the functions developed by receivers outside an insolvency proceedings scenario, in insolvency proceedings, receivers are also responsible for collecting money and/or carrying out other acts as the execution contracts, but in this case, they are appointed by court.

Therefore, in insolvency proceeding receivers can be of great help when collecting, assessing, and selling the assets of the estate for purposes of later distribution of the proceeds against creditors.

Ultimately, receivers facilitate the development of a quick and efficient insolvency proceeding and payment of creditors.

Commented [BT9]: OK but far too cursory. And what about SPCs? 2/6

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?

BITB is a secured creditor who holds a mortgage over four of VP's party boats. Therefore, BITB could enforce its security and appoint a receiver to collect the claim, what could occur regardless of a possible insolvency proceeding in place, according to Section 142 of the Companies Act.

In case of a receiver appointment, such receiver will act accordingly to the documents in which its powers are grounded and will generally realise the value of the encumbered assets and repay the creditor the amount of its unpaid debt.

Commented [BT10]: 2

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

Since the judgement was rendered by a foreign arbitral chamber, in view that until now Foreign Judgement Reciprocal Enforcement Act (1996 Revision) only applies to Superior Courts of Australia, and assuming foreign judgement is final, foreign court had jurisdiction over debtor, the decision was not rendered under fraudulent means, foreign judgement follows Cayman Islands public policy, and the foreign judgment is not contrary to rules of natural justice, JoBo could file an action under regular litigation procedure according to Grand Court rules to enforce ICC's judgement.

Commented [BT11]: 1. Reference to the relevant arbitration acts which dictate recognition and enforcement was called for

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

Unpaid employees could file regular litigation actions and proceedings under Grand Court rules. Also, unpaid creditors could file for VP's bankruptcy in case the aggregate amounts of debt are higher than KYD 40.

Commented [BT12]: The key point is that they would be preferential creditors 1/2 mark

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

Yes, the Cayman Islands Court have jurisdiction over VP, because the company is not only registered in Cayman Islands, but because the company also has property located and is carrying business within Cayman Islands jurisdiction, as per Section 2 of the Companies Act.

Commented [BT13]: 1

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

VP could request, under Part V, section 91A-J of the Cayman Islands Companies Act, the appointment of a restructuring officer on the grounds that VP is or is likely to be unable to pay its debts and that it intends to present a compromise of arrangement to its creditors or certain classes of creditors.

The filing petition may be presented by the directors of VP without the need for a resolution of the shareholders or any express powers to file such petition in VP's companies acts of association. The filing of such petition triggers the immediate moratorium, that has extraterritorial effects, staying all actions or proceedings in place and the filing of such actions and proceedings against debtor without court's authorization, with exception of the secured creditors, that may continue to enforce their claims against debtor.

Following the filing of the petition and the appointment of the restructuring officer, the restructuring may occur through several different forms (i.e. consensual deal, informal work-out, scheme of arrangements, among others).

Commented [BT14]: 2

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

Yes, Racklam family could still continue to play a part in running VP during any restructuring process unless the deposition of the current management is deemed necessary. In such a case, restructuring officer would then play the part in the management the Racklam used to play.

Commented [BT15]: 1/2 mark. Depends on terms of court order.

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

Cayman Islands court will take the jurisdiction over debtor into consideration before approving any proposed restructuring as well as the compliance with the legal requirements to do so, as an example, the filing petition shall provide that the filing entity is or is likely to be unable to pay its debts and that it intends to present a compromise of arrangement to its creditors or certain classes of creditors and be filed by the directors of VP without the need for a resolution of the shareholders or any express powers to file such petition in VP's companies acts of association.

Commented [BT16]: This question was about convening meetings, majorities and other tests such as the intelligent and honest member 1/2

Commented [BT17]: 7.5/15

* End of Assessment *

Commented [BT18]: TOTAL MARKS 31 / 50