



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.

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 [BT2]: 9/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

Yes, it is possible for a creditor to register its security over an asset in the Cayman Islands, depending on the type of asset. The Cayman Islands has ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property where mortgages and charges can be registered. The effect of registration gives the secured creditor priority over non-registered creditors and will mean that a third party purchaser of the charged asset will be deemed to have notice of any such interest and will acquire the asset subject to the secured creditor's interest.

Section 54 of the Companies Act also requires security interests to be entered in the register of mortgages and charges of the debtor company. Registering the security interest in the company's register of mortgages and charges does not however create priority. It does however put third party on notice of the existence of a security as the register is open for inspection by any member of the company or creditor.

Commented [BT3]: 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?

Yes, the Cayman Islands Grand Court has the power to assist foreign bankruptcy proceedings (including proceedings for the purpose of reorganising or rehabilitating an insolvent debtor) under Part XVII of the Companies Act. Section 241 provides that upon the application of a foreign representative, the Court may make orders ancillary to a foreign bankruptcy proceeding. In order for the Court to be willing to exercise its power, the foreign representative must satisfy the Court that it is appropriate for the Court to exercise its discretion by granting the relief sought in the foreign representative's application.

Section 242 provides that in determining whether to make an ancillary order under section 241, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with:

- (a) The just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;*
- (b) The protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;*
- (c) The prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;*
- (d) The distribution of the debtor's estate amongst creditors substantially in accordance with the statutory order of priority;*
- (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 [BT4]: 4 marks

Question 2.3 [maximum 3 marks]

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

Foreign judgments are recognised in the Cayman Islands through: (a) the Foreign Judgments Reciprocal Enforcement Act (1996 Revision); or (b) the common law. The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments.

To date, only judgments from the Superior Courts of Australia are able to recognised under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision). However, judgments from other jurisdictions can be enforced at common law if: (a) the judgment is final; (b) the foreign court had jurisdiction over the debtor; (c) the foreign judgment was not obtained by fraud; (d) the foreign judgment is not contrary to public policy of the Cayman Islands; and (e) the foreign judgment was not obtained contrary to the rules of natural justice.

Commented [BT5]: 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.

Yes is it possible for court appointed liquidators of an involvement 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.

Directors owe fiduciary duties to the company and if they breach these duties by failing, for example to act in the best interests of the company, by continuing to trade whilst insolvent, they may be financially liable for those breaches. A liquidator can pursue claims against directors on behalf of the company where the directors have breached their fiduciary duties. Also, in Prospect Properties v McNeill [1990-91 CILR 171], the Court held that where a company is insolvent, the directors' duty to act in the best interests of the company requires the directors to have regard to the interests of its creditors.

The Companies Act also contains provisions for insolvent trading as follows:

1. Section 99 of the Companies Act provides that any disposition of a company's property made after the deemed commencement of the winding up will be void if a winding up order is subsequently made (unless validated by the Court). This means that if directors make dispositions of the company's property after the date on which the petition is filed, the liquidator is entitled to apply for relief to require the repayment of the funds or the return of the asset.
2. Section 145 of the Companies Act provides that 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 and at a time when it is unable to pay its debts; and (b) the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors. A voidable preference can be set aside on application of the liquidator who can ask the Court to require the creditor to return the asset and to prove the amount of its claim in the liquidation. This means that if directors make voidable preferences those dispositions or payments can be set aside.
3. Section 146 of the Companies Act provides that a transaction where property is disposed of at an undervalue and with the intention of wilfully defeating an obligation owed to a creditor is voidable on application of the liquidator. The Companies Act defines undervalue to mean the provision of no consideration or a consideration which in money or money's worth is significantly less than the value of the property. This means that if directors wrongly dispose of property at an undervalue, those disposals can be set aside.
4. Section 147 of the Companies Act provides that if the business of a company was carried on with intent to defraud creditors, or for any fraudulent purpose, a 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 Court thinks proper. This means that directors can be held personally liable if the company was carried on with the intent to defraud creditors or for any fraudulent purpose.

Commented [BT6]: 9/9

Question 3.2 [maximum 6 marks]

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

This statement is incorrect because while receivers might not be explicitly provided for in the Companies Act or the Companies Winding up Rules (other than in respect of segregated portfolio companies), the Grand Court Rules contemplate that receivers may be appointed by the Court for the purposes of collecting money in respect of an asset or to carry out some other act in respect of the asset (ie to execute a document of title). Receivers can be appointed pursuant to security instruments and provide a way for creditors to recover debts from a defaulting debtor (other than liquidation).

Receivers provide a course of action for creditors who hold a security instrument. If for example, the security instrument provides for the ability of a creditor to appoint a receiver over the company's charged assets upon a default by the company, then upon default the creditor can do so. The receiver will upon appointment be able to act under

the powers set out in the security instrument which may include the right of sale of the property - the receiver will then be able to sell the property and repay the creditor the unpaid debt. This provides a way for the creditor to recover the debt from the defaulting debtor without having to go through the insolvency process (or to apply for the debtor's liquidation).

Receivers are also relevant in respect of segregated portfolio companies ("SPC"). Where the Court is satisfied that the SPC's assets attributable to a particular portfolio of the company are likely to be insufficient to discharge its debts, a receivership order may be made in respect of the portfolio. In those circumstances, the receiver plays an analogous role to a liquidator in that the receiver will manage the assets of the portfolio for the purposes of the orderly closing down of the business of or attributable to the portfolio, and the distribution of the portfolio assets.

Commented [BT7]: Good but reference to sections of statute and GCR (and case law) required for more marks. 4/6.

QUESTION 4 (fact-based application-type question) [maximum 15 marks in total]

Vegan Patty Inc (VP) is a company registered in the Cayman Islands. It operates a fleet of party boats cross central America and the Caribbean. It was founded by the wealthy Rackham family over 40 years ago. The family continues to own and manage the business.

Between 2015 and 2019, VP had been rapidly expanding its operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to COVID-19 adversely affected its revenues.

VP has only managed to stay afloat for the past three years with the assistance of a very large loan from Blue Iguana Treasure Bank (BITB). BITB has lent VP USD 300 million (USD 180 million of which is secured by a mortgage over four of VP's largest party boats). The loan facility has now been exhausted. VP has also fallen behind on the monthly repayments to BITB.

This year, the tourism market picked up again; however, VP cannot afford to pay the ongoing costs associated with maintaining its fleet of ships (which include electricity and water costs for its huge dry dock facility, ongoing engineering and mechanical costs and also wages, pension and health insurance for its reduced team of employees) let alone find enough money to buy the vast quantities of rum it needs to keep the tourist customers suitably refreshed.

To make matters worse, VP commissioned Johnson & Boris Ltd (JoBo) to build seven more oversized party boats only a few months before the pandemic struck. VP attempted to wriggle out of the contract but, by virtue of an arbitration clause, the dispute was referred to the ICC sitting in London. Earlier this month, the ICC ruled that VP must pay damages of USD 50 million to JoBo within 45 days. VP has no prospect of being able to satisfy that award.

You are a Cayman Islands-based insolvency professional and have been approached to provide advice on the following:

- (a) What action can BITB take to protect its interests?**
- (b) What action can JoBo take to protect its interests?**
- (c) What action can the unpaid employees take against VP?**
- (d) Does the Cayman Islands Court have jurisdiction over VP?**
- (e) Is there a legal route via which VP can protect itself and seek to restructure?**
- (f) Following on from (e) above, can the Rackham family continue play a part in running VP during any restructuring process?**
- (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?**

A number of issues arise from the above scenario, each of which are addressed in turn below.

(a) Actions BITB can take to protect its interests - BITB has lent USD300 million to VP, USD180 million of which is secured by mortgage over four boats. VP is now in default. On the assumption that the mortgage is a legal mortgage, BITB should protect its interests by taking possession of the boats and exercising its power of sale with respect to the boats, or by appointing a receiver to realise the boats. If the mortgage is an equitable mortgage, then subject to the mortgage agreement, BITB may be able to take steps to transfer the boats into its own name. BITB should also make sure that its mortgage is registered over the boats in the ownership register under the Maritime Authority Law.

Commented [BT8]: 2

(b) Actions JoBo can take to protect its interests - JoBo is an unsecured creditor, but can take steps to enforce its arbitral award against BP. JoBo might seek to appoint receivers under Order 45 of the Grand Court Rules to enforce the arbitral award. Since VP has no prospect of being able to satisfy the award, JoBo might consider proposing some form of restructuring to VP (ie a scheme of arrangement) or apply for VP to be wound up.

Commented [BT9]: 1.5. Please don't forget to reference procedures and laws.

(c) Action the unpaid employees can take against VP - the unpaid employees should demand payment of their wages from VP. The unpaid employees could also apply for a provisional liquidator over the company (in their capacity as creditors). In the event of VP's liquidation, the unpaid employees will have priority in any winding up of VP because they hold preferential debts.

Commented [BT10]: 1

(d) Does the Cayman Islands Court have jurisdiction over VP - Yes the Cayman Islands Court has jurisdiction over VP under section 91 of the Companies Act because VP is registered in the Cayman Islands (and may have property in the

Cayman Islands and/or may be carrying on business in the Cayman Islands, as it appears that it operates a fleet of party boats across the Caribbean)

- (e) *Legal route via which VP can protect itself and seek to restructure - VP can present a petition for the appointment of a restructuring officer under Part V of the Companies Act on the basis that: (a) it is or is likely to become unable to pay its debts; and (b) it intends to present a compromise or arrangement to its creditors (or classes of creditors). The petition will automatically trigger a moratorium which means that no action or proceedings can be initiated or proceeded with against VP without leave of the Cayman Court. It is also possible for VP to propose a scheme of arrangement.*
- (f) *Can the Rackham family continue to play a part in running VP during any restructuring process - yes it is possible for the Rackham family to continue to play a part in running VP during the restructuring process, but it may be that they are subject to the supervision of a restructuring officer. It will be for the Court to determine which powers remain with the Rackham family and which powers will be vested in the restructuring officer.*
- (g) *Factors that the Cayman Islands Court will take into consideration before approving any proposed restructuring - for the appointment of a restructuring officer, the Court will need to be satisfied that: (a) the statutory preconditions of insolvency or likely to become insolvent are met by credible evidence; (b) the statutory precondition of an intention to present a restructuring proposal to creditors is met by credible evidence of a rational proposal with reasonable prospects of success; and (c) the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding-up of the company. For a scheme of arrangement, the Court will need to be satisfied that the scheme is fair.*

Commented [BT11]: 1.5

Commented [BT12]: 2

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Commented [BT14]: 1.5. Reference to honest and intelligent investor etc needed for full marks

Commented [BT15]: 10.5/15

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* End of Assessment *