



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 [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?

A creditor can register its security over real estate, ships, aircraft, motor vehicles, and intellectual property, in centrally maintained registers. This would provide notice to third parties of the creditor's claim over that asset. Registration would also give the secured creditor priority over non-registered creditors.

Commented [BT3]: Good, so far as it goes. What about the ROM&C? See guidance text 5.3. 1.5 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 Grand Court has the power to assist in foreign bankruptcy proceedings. This power is mainly derived from Part XVII of the Companies Act. The court may exercise this power in the following circumstances:

- 1.) The just treatment of all holders of claims, wherever they are domiciled, in accordance with established principals of natural justice,**
- 2.) The protection of local claim holders against prejudice and inconvenience in the processing of claims in foreign proceedings,**
- 3.) Prevention of preferential or fraudulent dispositions of property in the debtor's estate,**
- 4.) The distribution of the estate among creditors substantially in accordance with the statutory order of priority,**
- 5.) The recognition and enforcement of security interests created by the debtor,**
- 6.) The non-enforcement of foreign taxes, fines, and penalties,**
- 7.) And, the mutual recognition and co-operation concerning legal decisions.**

Commented [BT4]: Reference to section 242 and 'best assure an economic and expeditious administration of the debtor's estate' required for full marks. 3.5 marks.

Question 2.3 [maximum 3 marks]

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

The legal frameworks for the recognition of foreign judgements in the Cayman Islands are common law and The Foreign Judgements Reciprocal Enforcement Act (1996 Revision). However, this will only be applied if the country from which the judgement originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgements. The foreign judgement will only be enforceable if it is:

- 1.) Final,**
- 2.) A money judgement, and**
- 3.) Made after the 1996 Act was extended to the relevant foreign country.**

Commented [BT5]: More detail on common law required. 2 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.

The Directors of the company have a fiduciary duty to act in the best interests of the company. As such, if the directors have breached this fiduciary duty and caused losses to the company, they can be held personally liable to the company for these losses.

The Grand Court has also held in *Prospect Properties v McNeil* that when a company is insolvent, the directors have a duty to act in the best interests of the company and the interest of its creditors. The best interest of the company is to be safeguarded against being in a position where it is unable to pay its creditors. The best interest of the creditors is to be paid back. As such, if the directors do not act in the best interest of the company and its creditors, they can also be held personally liable to the company.

Once the company is in official liquidation, the official liquidator can pursue the claims against the directors on behalf of the company if they have breached their fiduciary duty.

Also if the directors here found to be carrying out the business of the company with the intent to defraud the creditors, or for any fraudulent purpose, the liquidator can apply for an order for them to make contributions to the company's assets as the Court thinks proper.

Commented [BT6]: Yes, but don't forget the various statutory remedies - s.99, 145-147. 5/9.

Question 3.2 [maximum 6 marks]

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

In a Cayman Islands insolvency scenario, it is incorrect to say that receivers have no role, however, they have a very limited role. Receivers are not explicitly mentioned in the statutory provision, specifically the Companies Act and Companies Winding up Rules, which specifically deals with insolvency.

While the liquidators take on the primary responsibilities in an insolvency, there are circumstances in which receivers can be appointed. There are two main instances in which receivers may be appointed. The first instance is when the Court appoints a receiver for the collecting of money or to carry out some other act, for example, the execution of a contract or a document of title.

The second instance in which a receiver can be appointed is the Grand Court is satisfied that the assets in a particular portfolio in a Segregated Portfolio Company (SPC) are likely to be insufficient to discharge the claims of creditors in respect to that portfolio. However, the receiver only manages the assets in the specific portfolio to allow for the orderly closing down of the business and that the assets in the portfolio are distributed to those entitled to them.

As such, the statement 'receivers have no role in insolvencies' is not fully correct as receivers can be appointed by the Court when necessary. However, in Cayman Islands, insolvency practitioners have the primary responsibilities in insolvency scenarios and receivers are generally associated with security enforcement for assets and have limited roles in insolvency proceedings.

Commented [BT7]: Correct. Further detail would have secured full 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.) With the USD 180 million which BITB has secured through a mortgage over VP's largest party boats, BITB has an option to act depending on the type of mortgage it has. If BITB has a legal mortgage where it holds the legal title to the 4 boats, it can take possession of them and exercise its power of sale or appoint a receiver to realise the property if it has registered its security over these assets. If BITB has an equitable mortgage where the legal title of the boats belongs to VP, then BITB's attorney can execute a transfer of land if the mortgage agreement allows. If not, then BITB will have to apply to court for the specific performance and then the court may convert the equitable mortgage into a legal mortgage and transfer the rights and powers to BITB.**
 - b.) JoBo can take action in the form of a pledge, in which it takes possession of VP's party boats, if it has 7 party boats, until VP is able to repay the debt. However, as VP has no prospect in being able to repay the debt, the defaulting of a pledge would allow JoBo to have the right to take the full possession of the pledged assets and sell them.**
 - c.) As employees are treated as preferential creditors, they are paid in priority over all other debts which VP has. As such, the employees will have to ensure their amounts are recognized through a proof of debt if VP does go insolvent.**
 - d.) As VP is registered in Cayman, the Cayman Islands Court has jurisdiction over it. However other jurisdictions may also have an involvement over VP as it operates across central America and also has a loan in USD. It also has been ruled by ICC in London, and as such, although Cayman Islands has jurisdiction over VP other jurisdictions may as well.**
 - e.) Yes, there is a legal route VP can take to seek restructuring. VP can present a petition to the Grand Court for the appointment of a Restructuring Officer (RO) on two basis. VP already meets the first requirement which is that it is unable to**

Commented [BT8]: 2

Commented [BT9]: This q was about recognition and enforcement of an arbitral award. 1/2 mark.

Commented [BT10]: 1

Commented [BT11]: 1

pay its debts. The second requirement is that VP intends to present a compromise or arrangement to its creditors (or class of creditors)
The petition does not need the resolution of the shareholders and will automatically trigger a moratorium upon the filing of the petition. The moratorium will have an extraterritorial effect, but secured creditors will still have the right to enforce their security without the leave of the court and the RO.

Commented [BT12]: 2

If the court approves, then the RO will be appointed and can result in a deal or any other informal work-out with creditors of VP. Another option would be to use a Cayman Islands scheme of arrangement or support a restructuring proceeding in a foreign jurisdiction.

f.) It currently remains to be seen what role the current management of a company will have after the RO has been appointed. However, it is most likely that the Grand Court will determine these powers. As such, the Rakhm family will have to await orders from the court.

Commented [BT13]: 1

g.) The Court will mainly be taking the following three points into consideration before approving any proposed restructuring:

- a. Compliance with convening orders**
- b. Whether the majority fairly represents the class; and**
- c. Whether the arrangement (having regard to the alternatives) is such that an intelligent, honest member of the class convened, acting in their own interest, might reasonably approve it.**

Commented [BT14]: 2

Commented [BT15]: 9.5/10

* End of Assessment *

Commented [BT16]: 34.5