



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?

The Cayman Islands has centrally maintained ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property, but no public registration regime for other types of assets. Creditors may register their security over these kinds of assets located in the Cayman Islands. The effect of registration is that a third-party purchaser of the charged asset will be deemed to have notice of the creditor's interest and will therefore acquire the asset subject to the creditor's interest. Further, it gives the creditor priority over non-registered creditors.

Commented [BT2]: Good so far as it goes - what about a company's 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 power to make orders in respect of foreign insolvency proceedings pursuant to Part XVII of the Companies Act.

The Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 also apply to every application filed pursuant to Part XVII of the Companies Act and prescribes the procedures by which a foreign representative can be recognised in Cayman and seek the assistance of the Grand Court.

The Grand Court has power to make ancillary orders with respect to foreign bankruptcy proceedings pursuant to section 241 of the Companies Act. The circumstances in which the Court may exercise its discretion to do so are set out in section 242(1), which provides as follows:

- (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 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 order prescribed by Part V;*

Commented [BT3]: Yes, to 'best assure an economic and expeditious administration of the debtor's estate' - 3.5 marks.

- (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.

Question 2.3 [maximum 3 marks]

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

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for the recognition and enforcement of foreign judgments - but only in circumstances where the country from which the judgments was handed down has a substantive reciprocal arrangement with respect to the enforcement of Cayman Islands judgments. To date, the operation of the legislation has only been extended to judgments handed down by Australian Courts.

Order 71 of the Grand Court Rules provides that, in order to be enforceable, the foreign judgment must be: (a) final; (b) a money judgment; and (c) made after the 1996 Act was extended to the relevant foreign country.

The far more trodden path for recognition and enforcement is the common law route. A party seeking to have a foreign judgment recognised must commence new proceedings in the Cayman Islands based on the foreign judgment as an outstanding debt. At common law, both money and non-money judgments are enforceable.

In order to enforce a foreign judgment at common law, the following must be satisfied:

- (a) the judgment is final;
- (b) the foreign court had jurisdiction over the debtor;
- (c) the judgment was not obtained by fraud;
- (d) the judgment is not contrary to public policy of the Cayman Islands;
- (e) the foreign judgment was not obtained contrary to the rules of natural justice.

Once recognised as a local judgment, the full range of domestic enforcement remedies are available to the applicant.

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.

Yes.

- Avoidance of dispositions. *Pursuant to section 99 of the Companies Act, any dispositions of a company's property made after the deemed commencement of the winding up of the company (namely the date on which the petition was filed rather than the date on which the order is made) will be void - if a winding up order is subsequently made - unless otherwise validated by the Court. The Court has power to validate post-petition grants of security. The Court will normally validate such arrangements if the company is clearly solvent and if the Court is satisfied that an "intelligent and honest" director acting reasonably would come to that decision.*
- Voidable preference payments. *Pursuant to section 145 of the Companies Act, any payment or disposal of property to a creditor will be deemed a voidable preference: (i) the payment is made in the six month period prior to the deemed commencement of the liquidation and at a time when it is unable to pay its debts; and (ii) the dominant intention of the directors in making the payment was to give the applicable creditor a preference over other creditors. The Court has held that giving a preference over other creditors means putting that creditor in a better position than it otherwise would have been (*Weaving Macro Fixed Income Fund*).*
- Transactions made at an undervalue. *Pursuant to section 146 of the Companies Act, a transaction in which property is disposed of at an undervalue - and with the intention of wilfully defeating an obligation owed to a creditor (i.e. an intent to defraud) is voidable on the application of the liquidator (which must be made within six years of the transaction). Undervalue means the provision of no consideration or a consideration which in money or money's worth is significantly less than the value of the property. The creditor or liquidator seeking to have the transaction set aside must establish the intent to defraud.*
- Fraudulent trading. *Pursuant to section 147 of the Companies Act, in circumstances where a business 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 claw back the contributions to the company's assets.*

Commented [BT5]: Good, but don't forget the common law solution. 7/9

Question 3.2 [maximum 6 marks]

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

While receivers may be appointed, they are not explicitly mentioned in the legislation relevant to insolvency (i.e. the Companies Act and the Companies Winding Up Rules). That is not to say, however, that they have no role to play in Cayman Islands insolvency processes.

For example, the Grand Court Rules contemplate their appointment for the purposes of collecting money or to carry out some other act (i.e. the execution of a contract). Receivers may also be appointed under Order 45 to enforce court orders for the payment of money. There is also a provision enabling the Court to appoint receivers by way of equitable execution.

Further, receivers and receivership orders are specifically provided for with respect to "Segregated Portfolio Companies", which are a unique creation of Cayman statute. An SPC is effectively a company which remains a single legal entity, but which may create "portfolios" which are ring-fenced from the main entity and other portfolios, for the purposes of allocating assets and liabilities - keeping these assets and liabilities separate from each other and unable to be reached by creditors for the purposes of satisfying a debt owed by a separate portfolio.

In circumstances where the Court is satisfied that the SPC's assets allocated to a particular portfolio are likely insufficient to discharge the claims of creditors, it has the power to make a receivership order with respect to that portfolio. In this scenario, the role of the receiver is analogous to that of a liquidator. Such an order must direct that the business and assets of, or attributable to, a portfolio must be managed by a receiver for the purposes of: (a) the orderly closing down of the business of, or attributable to, the segregated portfolio; and (b) the distribution of the portfolio assets attributable to the portfolio to those entitled to have recourse thereto.

Note however that a receivership order may not be made if the SPC is in the process of being wound up and shall cease to be of effect upon the commencement of a winding up process - but without prejudice to prior acts of the receiver (or their agents).

Once an application for the appointment of a receiver has been made, no action may be brought against the SPC with respect to that portfolio - except with leave of the Court.

Commented [BT6]: Good. Specific reference to sections of statute and case law required for full marks. 5/6

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 could seek to enforce its security against Vegan by way of the appointment of receivers to take possession of the encumbered assets of which BITB has security and the receivers could exercise its right of sale over those assets in accordance with the security documents.

Commented [BT7]: 1.5

BITB could seek to wind up VP on the basis of the unpaid repayments being an outstanding debt (i.e. on the grounds of insolvency) and seek the appointment of a liquidator to liquidate VP's assets and distribute to BITB and other creditors.

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

In order for JoBo to seek to recover the damages owing to it pursuant to the agreement it entered into with VP, it would first need to have the arbitral award recognised in the Cayman Islands as a local judgment pursuant to section 72 of the Arbitration Act 2012. Section 72(5) provides that any arbitral awards from any foreign state are enforceable in the Cayman Islands under the enforcement provisions of section 6 and 7 of the Foreign Awards Enforcement Act. Once recognized, JoBo would have access to the full set of enforcement options available for the purposes of enforcing a domestic judgment (including the option to wind up VP).

Commented [BT8]: 3

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

*In the event that VP proceeds into liquidation, debts owing to employees of VP would fall into the category of preferential debts pursuant to section 141 of the Companies Act. The liquidator so appointed to VP could seek to have the debts owed to the employees satisfied as a matter of **priority**.*

Commented [BT9]: 1.5

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

Yes, the Cayman Court has jurisdiction over all entities registered in the Cayman Islands pursuant to section 91 of the Companies Act.

Commented [BT10]: 1.5

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

*Yes. VP could apply to the Cayman Court for the appointment of a restructuring officer (RO) pursuant to section 91A of the Companies act. Upon the appointment of an RO, an immediate moratorium is imposed at law which prevents creditors from seeking to take legal action against VP without leave of the Court. To bring such an application, VP must be, or likely to become, unable to pay its debts; and must intend to present a compromise or arrangement to its creditors. (Note that secured creditors will continue to be able to enforce their security without leave of the court and without regard for the **RO**).*

Commented [BT11]: 2

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

*Yes. Assuming the Rackham Family are directors of VP and had operational control of the company, it is possible that the RO is appointed with a more limited spectrum of powers and functions and allowing management to continue to operate carry out the business of the **company**.*

Commented [BT12]: 1

Section 91B(5) requires an order appointing an RO to set out:

“(b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and

“(c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions.”

Thus, while it will depend on the Court’s determination, it is possible that the Rackham Family/the directors/management of VP will be able to continue to run the business.

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

The Court will consider the following factors when considering whether to approve a proposed restructuring:

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

Commented [BT13]: 2

Commented [BT14]: 12.5/15

* End of Assessment *

Commented [BT15]: TOTAL MARKDS 42.5 OUT OF 50