



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?

Yes, it is possible for a creditor to register its security over an asset in the Cayman Islands. There are centrally maintained ownership registers for ships, aircraft, real estate, intellectual property and motor vehicles where mortgages and charges can be registered.

There are no public security registers for any other asset types in the Cayman Islands. However, section 54 of the Companies Act requires any security interests to be recorded on a register of mortgages and charges. This register should be maintained by the company and held at its registered office in the Cayman Islands.

By registering security over an asset it means that third parties are put on notice of the security interest. For those assets with public, centrally maintained registers, third party acquirers are deemed to have notice of the charge and will buy the asset with the secured charge attached. This registration allows the secured creditor priority over creditors that are not registered.

For charges that are maintained on a company's register of mortgages and charges, this doesn't give the creditor priority, but the register is open for members of the company or creditors to inspect meaning they will be on notice of the security that is recorded.

Commented [BT2]: 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?

The Grand Court has the power to assist foreign bankruptcy proceedings by the providing the following forms of ancillary relief:

- i) Stopping the commencement, or staying continuation of legal proceedings against a debtor;*
- ii) Staying enforcement of a judgment against a debtor;*
- iii) Recognising the right of a foreign representative to act in the Cayman Islands on behalf of, or in the name of, a debtor'*
- iv) Ordering the handing over of any property belonging to a debtor to the foreign representative; and*
- v) Requiring a person who has information relating to the affairs or business of a debtor to be examined by give documents to its foreign representative.*

The powers to make these ancillary orders to support foreign bankruptcy proceedings are included in Part XVII of the Companies Act.

The Grand Court must determine whether to make these ancillary orders by being guided by the individual facts of the case to ensure an economic and expeditious administration of the estate of the debtor. The Grand Court will have to ensure the case facts are consistent with seven key points, e.g. just treatment of all claim holders wherever they are domiciled, and prevention of fraudulent or preferential dispositions of property in the estate of the debtor.

Commented [BT3]: Yes but more on this needed - ref to section 242 and 'best assure an economic and expeditious administration of the debtor's estate' required for full marks. 3 marks.

Question 2.3 [maximum 3 marks]

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

The Cayman Islands has not entered into any international treaties for reciprocal recognition or enforcement of foreign judgements. There is a statutory scheme for recognition and enforcement for foreign judgements but this only applies where the country in which the judgment originates reciprocates the treatment of enforcing Cayman Islands Judgements, this is provided for in the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) ("1996 Act").

Enforcement of foreign judgments is typically achieved under common law by starting a new action in the Cayman Islands based on the foreign judgment being an unsatisfied debt or other obligation which are conducted under The Grand Court Rules.

For enforcement of a foreign judgment at common law the mandatory requirements are:

- i) The foreign judgment was not obtained by fraud;*
- ii) The foreign judgment was not obtained contrary to natural justice rules;*
- iii) The judgment is final;*
- iv) The foreign judgment is not contrary to Cayman Islands public policy; and*
- v) The foreign court has jurisdiction over the debtor.*

There is a six-year limit from the date of the judgment, or last judgment in the case of an appeal, for both common law enforcement and under the 1996 Act.

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.

Once liquidators have been appointed by the court over an insolvent company, they are responsible for realising and distributing the assets of a company to its creditors. They are also given certain powers to investigate into the affairs of the business including requiring directors, employees or professional service providers to produce a complete statement of affairs of the company along with an affidavit. As an officer of the court, the liquidator should make himself thoroughly acquainted with the affairs of the company and to compress or conceal nothing.

During these investigations, if it was determined that fraudulent trading took place by the directors, and the business was carried on with the intent to defraud customers, Section 147 of the Companies Act allows liquidators to apply for an order from the Grand Court requiring the director/s in question to make a contribution to the company's assets as the Grand Court thinks proper.

Whilst there is no statutory requirement obligating the company to file for insolvency and the Companies Act doesn't include for prohibition on wrongful trading, the directors of the company can still be made personally liable for any losses that they cause to the company if acting in breach of their fiduciary duty to act in the company's best interest. The liquidator can pursue claims against the directors in the company's name for breach of their fiduciary duty.

*Looking at case law, in *Prospect Properties v McNeill* the Grand Court held that when a company is insolvent, the fiduciary duty of the directors to act in the best interest of the company requires that they should consider the interest of its creditors. It is in the interest of the company to be safeguarded against being put in a position where it cannot pay its creditors and it is in the interest of creditors to be paid.*

Other claw-back mechanisms that are available against a director include:

- *Avoidance of property dispositions - if the director has made any dispositions of the company's property after the deemed commencement of winding up then these will be made void as per Section 99 of the Companies Act.*
- *Voidable preference - If a director has made any payments to themselves within six-months of the liquidation commencement and at a point when the company is unable to pay its debts and the dominant intention of the director was to give themselves a preference over other creditors then Section 145 of the Companies Act states that it should be voidable and the director will have to return the funds.*
- *Avoidance of dispositions made at an undervalue - another voidable transaction would be if a director sold a company asset to themselves at an undervalue with the intention of avoiding an obligation owed to a creditor. The liquidator can make an application to the Grand Court within six years of the disposal requiring the asset to be returned to the company.*

Commented [BT5]: 9/9

Question 3.2 [maximum 6 marks]

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

Receivers are not explicitly mentioned in the Cayman insolvency legislation, being the Companies Act and Companies Winding Up Rules, however, receivers do have a role in a Cayman Islands insolvency scenario. The Grand Court Rules ("GCR") consider that the Grand Court may appoint receivers for the purposes of collecting money or carrying out some other act such as the execution of a contract.

The appointment and duties of receivers are governed by Order 30 of the GCR and Order 51 of the GCR provides for the appointment of receivers by equitable execution. Order 45 of the GCR details that receivers can be appointed to enforce court orders that instruct the payment of money.

Receivers and receivership orders for Segregated Portfolio Companies ("SPC") are specifically provided for by statute. If the Grand Court is content that the assets attributable to an SPC's particular portfolio are likely not sufficient to pay creditor claims of that portfolio then it can make a receivership order over said portfolio. The purpose of that receivership is to close down the segregated portfolio and distribute the assets to those that are entitled to it.

Receivers can also be appointed pursuant to the rights of a security instrument, such as a fixed or floating charge, if the debtor defaults on its obligations. In this instance court involvement is not required to appoint the receiver, nor will the court supervise the receivership. The duty of the receiver is usually to the secured creditor and their powers will be set out in the charge document, which will usually include the right to sell the asset. The receiver will typically sell the charged asset and distribute the realisations to the secured creditor up to the amount of the unpaid debt.

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?**
- (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) As BITB hold a mortgage over four of VP's boats it means BITB is a secured creditor up to the amount USD 180 million. This charge will be included on the Cayman Islands public centrally maintained register and if VP were to sell those four ships the charges would remain with the assets.**

As a secured creditor BITB could at any point choose to enforce its security. This could be via the appointment of a receiver over VP, providing the mortgage agreement allows it, to realise the secured ships and distribute the funds up to USD 180 million. By appointing a receiver this may avoid the need for a court appointment which will reduce costs involved in realising the assets.

The remaining USD 120 million of the debt owed to BITB would constitute an unsecured claim. As VP has fallen behind on its loan payments BITB could bring a

winding up petition against VP to place the company in liquidation on the grounds that is in insolvent and cannot pay its debts as they fall due. BITB's secured amount would rank highest in the priorities of distributions in a liquidation and the unsecured amount would rank behind liquidator's fees and expenses pari passu with all other general unsecured creditors.

Commented [BT7]: 2.5

(b) Should JoBo not receive its USD 50 million within the 45-day period, JoBo could bring a winding up petition against VP in the Cayman Islands Grand Court based on it not being able to pay its debts when they fall due. The onus is on the party bringing the petition, in this instance JoBo, to prove that VP is insolvent and should be placed into liquidation. The USD 50 million would constitute an unsecured claim against VP and JoBo would need to submit a proof of debt which the liquidator will be able to accept, reject or request further evidence to substantiate the claim.

Commented [BT8]: Yes, but the award needs to be recognized first? How? 1 mark

Alternatively, JoBo could commence Scheme of Arrangement proceedings, with the consent of VP, which is a court approved arrangement or compromise entered into by the company and its creditors/members, as per section 86 of the Companies Act. If VP and JoBo come to an agreement to restructure VP's liabilities, more than 50% in number and at least 75% in value of creditors in the same class would need to approve the scheme and it would then need to be sanctioned by the court.

(c) The unpaid employees would constitute as creditors of VP and could bring a winding up petition against VP. Their outstanding wages and benefits would be considered preferential debts and would rank equally with unsecured debts not subject to subordination agreements and any taxes due to the Cayman Islands Government.

Commented [BT9]: 1

(d) The Cayman Islands Grand Court has jurisdiction over corporate liquidations and restructurings that are incorporated in the Cayman Islands, incorporated in another country but registered in the Cayman Islands, or a foreign company that has property in Cayman, is carrying out business in Cayman, is a general partner of a limited partnership or is registered as an overseas company under Part IX. As VP is registered in the Cayman Islands the Grand Court does have jurisdiction over an insolvency proceeding brought against VP.

Commented [BT10]: 1.5

(e) To protect itself from creditors seeking to wind up the company, VP can look to present a petition to the Grand Court for the appointment of a restructuring officer. As per Part V section 91B of the Companies Act, this can be brought by the directors of the company without the express power in the company's articles of association and without a resolution of the shareholders (although noting that the Rackham family both own and manage VP). The directors must show to the Grand Court that it is or is likely to become not able to pay its debts and it plans to present an arrangement or compromise to its creditors. The filing of this appointment will automatically trigger a moratorium period that has extraterritorial effect,

protecting VP from any proceedings, domestic or foreign, being initiated or continued against it.

If VP were to seek a reorganisation prior to 30 August 2022 then it would look to file a petition with the Grand Court for a provisional liquidation rather than the recent addition of a restructuring officer as per the recently amended Companies Act.

Commented [BT11]: 2.5

(f) It is not entirely clear whether, and if so to what extent, the court will allow the current directors to continue to manage a company once a restructuring officer is appointed, however it is expected to be in line with the process for a provisional liquidation. In a provisional liquidation, the powers of the restructuring officers will be given to them in the court order and each order is tailored to the specific needs of the company. Likewise, the order will also stipulate whether the current management are entitled to continue to run the company whilst it seeks to restructure the company.

Commented [BT12]: 1

It is entirely possible that the Rackham family could continue to manage VP during the restructuring and the restructuring officer's powers will be limited, but it will depend on the court order. If the court has reason to suspect the Rackham family has or will mismanage VP then their management powers could be completely stripped from them.

(g) In order to grant a restructuring order, the court will need to be satisfied that VP is or is likely to become unable to pay its debts and it intends to present an arrangement or compromise to its creditors. The arrangement with creditors can be a consensual deal or other informal work-out with the creditors or it can be a Cayman Islands scheme of arrangement.

The Grand Court must be satisfied that scheme of arrangement has been approved by the requisite amount of creditors/members before approving the restructuring agreement. Prior to sanctioning the restructuring agreement the Grand Court will be concerned with compliance with the governing order, whether the majority of the creditors approving the scheme fairly represent the class, and whether the arrangement is such that an honest and intelligent member of the class that was convened, acting in their own interest, may reasonably approve it.

Commented [BT13]: 2

Commented [BT14]: 11.5

*** End of Assessment ***

Commented [BT15]: TOTAL MARKS 44.5/50