



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**

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

*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?***

Creditors may register their security over assets in the Cayman Islands via public register for real estate, ships, aircraft, motor vehicles and intellectual property. The effect of registration is that a third party purchaser of such an asset is that they will be deemed to have notice of the security and that the secured creditor has priority over non-secured creditors.

Commented [BT3]: Good so far as it goes - what about other assets? And the 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?***

The Grand Court has the power to assist in foreign bankruptcy proceedings (defined as including proceedings for the purpose of reorganising or rehabilitating an insolvent debtor) pursuant to Part XVII, sections 240 – 243 of the Companies Act (2023 Revision). In order for the Court to exercise its discretion to make ancillary orders in relation to a foreign bankruptcy proceeding, the court shall be guided by matters which will best ensure an economic and expeditious administration of the debtors estate. The factors the Court must consider in doing so are listed under s 242 (1) (a)-(i) of the Companies Act (2023 Revision) 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;
- (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.***

The Legal framework for enforcing judgments in the Cayman Islands is limited to two means. A statutory mechanism, being the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) which solely extends to judgments from the Superior Courts of Australia. The procedure is governed by Order 71 of the Grand Court Rules and in order to be enforceable,



the foreign judgment must be a final, money judgment, made after the Act was extended to the relevant country (as noted, solely Australia at present).

The alternative mechanism to obtain recognition of foreign judgments in the Cayman Islands is by common law. Again, the procedure is governed by the Grand Court Rules. In order for the foreign judgment to be enforceable at common law, the following requirements apply:

- (a) The foreign judgment must be a final judgment;
- (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 the public policy of the Cayman Islands;
- (e) The foreign judgment was not obtained contrary to rules of natural justice.

Commented [BT5]: 2.5 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.***

There are a range of circumstances in which liquidators or creditors of an insolvent company may pursue directors or otherwise recover payments by a company that should not have been made.

Post-commencement of liquidation, any disposition of company property must first be validated by the Court pursuant to s 99 of the Companies Act. Otherwise, any such transaction is void.

There are also circumstances where transactions that occurred prior to the commencement of a liquidation. For example, pursuant to s 145 of the Companies Act, preference payments may be voidable. A voidable preference requires payment or disposal of property to a creditor that is made in a six month period before the deemed commencement of the liquidation, made at a time that the company was unable to pay its debts in circumstances where the dominant intention of the company directors was to give a certain creditor a preference over others.

Similarly, dispositions made at undervalue are also voidable pursuant to s 146 of the Companies Act. Section 146(2) records that “Every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator”. As indicated, an application to void an disposition made at an undervalue must be brought by a liquidator. The liquidator must bring the application within six years of the transaction. A disposition at undervalue is defined as

- “ (a) the provision of no consideration for the disposition; or
- (b) consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition”

Equally, the liquidator must show that there was an intention to defraud, meaning to wilfully defeat an obligation owed to a creditor.

Fraudulent trading pursuant to section 147 of the Companies Act is another means by which payments or transactions may be reversed. Under this section a liquidator may make an application to the court for a declaration if it appear that in the course of winding up a company that business of the company has been carried out with an intent to defraud creditors of the company, or of any other person, or for any fraudulent purpose. Upon granting the application, the court may declare that persons who were knowingly parties to the fraudulent trading are liable to make contributions to the company's assets in a sum determined proper by the Court.

**Commented [BT6]:** 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 are not specifically referred to in the Companies Act and the Companies Winding up rules under the provisions that deal with insolvency, that is not to say receivers have no role in a Cayman Islands insolvency scenario.

Fundamentally, receivers play a role in enforcing security rights against assets. In circumstances where a security instrument provides, receivers may be appointed without the need make an application to the Court, providing creditors with an alternative route to recovery. Indeed, secured creditors are not required to obtain leave of the court to enforce a security interest pursuant to s 142 of the Companies Act which suggest that this alternative route is anticipated by the legislation. By appointing a receiver, a creditor may recover an unpaid debt from an insolvent individual through the receiver selling the secured asset, or through other means specified in the instrument. Further, receivers are not typically supervised by the Court and usually owe duties to the creditor rather than the debtor meaning their appointment can be a useful tool for creditor with the ability to do so.

However, receivers do have a statutory role in relation to Segregated Portfolio Companies (SPC). If the Grand Court is satisfied that a particular portfolio of an SPC are likely to be insufficient to discharge creditor claims in relation to that portfolio, a receiver may be appointed to act in a similar fashion as a liquidator in relation to that particular portfolio. Once made, a receivership order must direct that the business and assets of the relevant portfolio of the SPC must be managed by a receiver for the purposes of the closing down of that portfolio's business and distribution of its assets to those entitled to them (akin to a liquidation of the isolated portfolio). That being said, a receivership order may not be made if the SPC is in the process of being wound up, which could be interpreted as to suggest that receivers do not play a role in insolvency. However, for the numerous reason detailed above, it is clear that receivers do in fact play an important role in certain insolvency scenarios in the Cayman Islands.

**Commented [BT7]:** 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?**

What action can BITB take to protect its interests?

BITB could appoint receivers and/or take possession of and exercise its right of sale over the four boats over which it holds a secured interest, subject to the terms of the security instrument and assuming its security interest is registered against the boats.

Commented [BT8]: 1.5

What action can JoBo take to protect its interests?

In order to protect its interests, JoBo will need to have its arbitral award recognised in the Cayman Islands. To do so, JoBo will need to apply to the Grand Court pursuant to s 72 of the Arbitration Act 2012 (there does not seem to be any reference to this Act in the materials) which permits arbitral awards from any foreign state, with leave of the Court, to be enforced in the same manner as a judgment or order of the Court to the same effect. Once leave is obtained, JoBo could apply to wind up VP on the basis that it is unable to pay its debts pursuant s 92(d) and 93(c) of the Companies Act as evidence by its failure to pay the arbitral award. Alternatively, JoBo could serve a statutory demand on VP for the same amount of the arbitral award (now judgment) and apply for a winding up order pursuant to 92(d) and 93(a) of the Companies Act.

Commented [BT9]: 2.5

What action can the unpaid employees take against VP?

In any eventuating liquidation, sums due to employees are preferential debts pursuant to s 141 of the Companies Act, meaning the amounts owed to them are paid in priority to all other debts (excluding secured creditors and liquidators costs). Accordingly, it may be in the employees interests to have VP wound up as the unpaid amounts rank highly in any ultimate distribution.

Commented [BT10]: 1.5

Does the Cayman Islands Court have jurisdiction over VP?

Yes - VP is a company registered in the Cayman Islands. In relation to any liquidation, jurisdiction is specifically conferred to the Grand Court pursuant to section 91 of the Companies Act.

Commented [BT11]: 1.5

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

Yes – Pursuant to section 91A-J of the Companies Act, VP may wish to present a petition to the Grand Court for the appointment of a restructuring officer (RO). The presentation of such a petition will have the immediate effect of imposing a statutory moratorium, thereby providing VP with protection. It is reasonably clear that VP cannot pay its debts satisfying the first requirement when presenting a petition to appoint an RO s 91B(1) (a). However, VP must also intend to present compromise to creditors in order to invoke the jurisdiction: s 91B(1) (b). A petition may be presented by VP's directors without the need for a resolution of its members or express power in its articles of association.

Commented [BT12]: 2.5

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

Pursuant to s91B(4) an RO “shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company”. Further, pursuant to s 91B(5) an order appointing and RO is required 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”

Accordingly, it may be that the Rackham Family (assuming they are directors as well as owners) retains control of day to day operations. Equally, they may be displaced. In short, the extent of their involvement will depend on the terms of the RO order.

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

In order to become effective, a restructuring will require court sanction. The primary factors that the Court will consider when determining whether to approve a restructuring in the form of a scheme of arrangement are whether:

- (a) There has been compliance with the convening orders (provides for the creditor meeting through which the scheme will be approved);
- (b) The majority fairly represents the class; and
- (c) The arrangement, having regards to its alternatives, is such that an intelligent, honest member of the class convened, acting in their own interest, might reasonably approve it.

**\* End of Assessment \***

Commented [BT13]: 1

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