



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) **No 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:**

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

**(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?**

**The Caymans Islands have ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property, which are centrally maintained. Mortgages and charges can be registered therein. Registration means that a third-party purchaser of the charged asset will be deemed to have notice of any such interest and will, therefore, acquire the asset subject to the secured creditor's interest. Registration also gives the secured creditor priority over non-registered creditors.**

**This registration regime is limited to the types of assets detailed above. Outside of those, a creditor must ensure it takes adequate steps to investigate (in advance) whether a particular asset is already encumbered and also ensure it has sufficient control over an asset to prevent a third party from purchasing it.**

**Section 54 of the Companies Act requires that security interest be entered in the register of mortgages and charges of the debtor company. The register must be maintained by the company at its registered office in the Cayman Islands. Any failure by a company to comply with its obligation to update the register of mortgages and charges does not, in itself, invalidate any security interests that are not recorded.**

**Registering a security interest in the debtor company's register of mortgages and charges does not create a priority. The register is open for inspection by any member of the company or creditor and puts third parties on notice of the existence of a security interest recorded therein. Under Cayman Islands law, the relevant law governing the priority and perfection of security interests will be determined by the location of the relevant asset.**

Commented [BT3]: 3 marks

Question 2.2 [maximum 4 marks]

**Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?**

**The Grand Court has the power to make orders in support of foreign insolvency proceedings under Part XVII of the Companies Act.**

**There are no threshold tests for the grant of assistance, nor are there automatic rights based on the centre of main interest (COMI) of the debtor. Rather, foreign representatives must satisfy the Cayman Islands court that it is appropriate for the court to exercise its discretion by granting the relief sought in the foreign representative's application.**

**The Grand Court can provide the following forms of ancillary relief:**

- a) **recognising the right of a foreign representative to act in the Cayman Islands on behalf of, or in the name of, a debtor;**



- b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;**
- c) staying the enforcement of any judgment against a debtor;**
- d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and to produce documents to its foreign representative; and**
- e) ordering the handover to a foreign representative any property belonging to a debtor.**

**In determining whether to make such ancillary orders, the Grand Court is guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with:**

- a) the just treatment all holders of claims come out wherever they are domiciled, in accordance with established principles of natural justice;**
- b) the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings;**
- c) the prevention of preferential or fraudulent dispositions of property in the debtor's estate;**
- d) the distribution of the estate among creditors substantially in accordance with the statutory order of priority;**
- e) the recognition and enforcement of security interests created by the debtor;**
- f) the non-enforcement of foreign taxes, fines and penalties;**
- g) comity (mutual recognition and cooperation concerning legal decisions).**

Commented [BT4]: 4 marks

Question 2.3 [maximum 3 marks]

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

#### ***Treaties***

**The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments, neither has the UK extended its ratification of any such treaties to the Cayman Islands by Order in Council (save for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).**

**The Cayman Islands is not a signatory to The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.**

***Statute***

**The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for recognition and enforcement of foreign judgments. However, this only applies where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands judgments.**

**To be enforceable, a foreign judgment must be:**

- a) final;**
- b) a money judgment; and**
- c) made after the 1996 Act was extended to the relevant foreign country.**

***Common law***

**Given the limited application of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision), the enforcement of foreign judgments is usually achieved by commencing a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation.**

**Such actions are conducted under the regular procedural regime for litigation in the Cayman Islands (that is, The Grand Court Rules).**

**Money and non-money judgments (including declaratory judgments) are enforceable at common law.**

**The mandatory requirements for enforcement of a foreign judgment at common law are:**

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

**Once a local judgment has been obtained over the full range of domestic enforcement remedies are available.**

***Limitation***

**A six-year limitation period applies both for common law enforcement and under the 1996 Act. The period runs from the date of the judgment or, when there have been appeals, the date of the last judgment.**

Commented [BT5]: 3 marks

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 9 marks]

***In the absence of a statutory prohibition on insolvent trading, is it possible for court appointed liquidators of an insolvent company, or creditors of such a company, to hold its former directors accountable by either seeking financial damages against those directors and / or by seeking to "claw back" any payments that those directors should not have made? If so, please explain the possible options.***

***There is no statutory obligation to file for insolvency and the Companies Act does not contain a prohibition on wrongful trading (that is, continuing to trade whilst insolvent). Directors can, however, be held personally liable to the company for any losses which they cause to the company if they act in breach of their fiduciary duty to act in the best interests of the company.***

***In Prospect Properties -v- McNeill [1990-91 CILR 171], the Grand Court held that where a company is insolvent, the directors' duty to act in the best interests of the company requires them to have regard to the interests of its creditors. It is in the interest of the creditors to be paid and in the interest of the company to be safeguarded against being put in a position where it is unable to pay. Where a company is in official liquidation, the official liquidator can pursue claims against the directors on behalf of the company (in the company's name) for breach of their fiduciary duty.***

***If a winding up order is made and a liquidator is appointed by the court, the commencement date will be deemed to be the date on which the petition was filed, rather than date on which the order was made. The liquidator is entitled to apply for appropriate relief to require the repayment of funds, or return of assets paid out from the company, which may constitute voidable property dispositions under s.99 of the Companies Act.***

***The court has the power to validate post-petition grants of security if the company is clearly solvent and the court is satisfied that an "intelligent and honest" director acting reasonably would come to that decision. The court is unlikely to endorse such an arrangement where the company is insolvent, unless it can be shown that the grant of***

**security has corresponding benefit to the company and enhances the value for creditors as a whole.**

**Where no petition has yet been filed, any such transaction is not caught by s.99 of the Companies Act, but may be the subject of other clawback mechanisms, including:**

***Voidable preference***

**Pursuant to s.15 of the Companies Act, any payment or disposal of property to a creditor constitutes a voidable preference if:**

- a) it occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts;**
- b) the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.**

***In re Weaving Macro Fixed Income Fund Ltd (In Liquidation), the Cayman Islands Court of Appeal and Judicial Committee of the Privy Council held that giving a preference to other creditors means putting that creditor in a better position than it would otherwise have been and a dominant intention may be inferred by the court from the available evidence before it.***

**A disposition made to a "related party" of the company will be deemed to have been made with a view to giving a preference. A disposition that is set aside as a preference is voidable on the application of the liquidator, who can ask the Grand Court to order the creditor to return the asset and prove in the liquidation for the amount of its claim.**

***Voidable dispositions made at undervalue***

**Pursuant to s.146 of the Companies Act, a transaction in which property is (i) disposed of at an undervalue; and (ii) with the intention of wilfully defeating an obligation owed to a creditor (i.e., an intent to defraud) is voidable on an application of the liquidator.**

**"Undervalue" means the provision of no consideration or a consideration which in money or money's worth is significantly below the value of the relevant property. The burden of proof lies with the creditor or liquidator seeking to have the relevant disposition set aside to establish an intent of fraud and such an application must be brought within six years of the disposal.**

Question 3.2 [maximum 6 marks]

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

**Receivers are not mentioned in the statutory insolvency provisions within the Companies Act and Companies Winding Up Rules. The Grand Court Rules ("GCR") do,**

**however, contemplate that receivers may be appointed by the court for the purposes of collecting money or to carry out some other act.**

**Order 30 GCR governs the appointment and duties of receivers. Order 45 GCR provides that receivers may be appointed to enforce court orders for the payment of money. Order 51 GCR also provides for the appointment of receivers by way of equitable execution.**

**Receivers and receivership orders are, however, specifically provided for in respect of Segregated Portfolio Companies ("SPCs") - a regular company permitted to create separate portfolios for the application of different types of assets and liabilities. If the Grand Court is satisfied that an SPC's assets attributable to a particular portfolio of the company are likely to be insufficient to discharge creditors' claims in respect of that portfolio, it may make a receivership order in respect of that portfolio. The role is analogous to a liquidator.**

**Aside from SPCs, the main relevance of receivers in an insolvency scenario is that receivership can offer an alternative course of action for certain creditors. Receivers may be appointed without any court involvement pursuant to rights in a security instrument (i.e., the holder of a fixed or floating charge can - if provided for in the security instrument - appoint a receiver over the company's charged assets if a debtor defaults on its obligations).**

**The receiver will act under the powers set out in the charge document (which will typically include a right of sale) and will generally realise the value of the charged asset and repay the creditor the amount of its unpaid debt. Here, the receiver will not be supervised by the court, and will usually owe its duties to the creditor rather than the debtor company.**

**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?***

- 
- a) If the mortgage is a legal mortgage, then BITB holds the legal title to the four boats over which the mortgage has been secured. If VP has defaulted on the loan repayments to BITB, then BITB is permitted to take possession and exercise a power of sale of the four boats, or may appoint a receiver to realise the value of the boats.***

***If the mortgage is an equitable mortgage, then subject to the terms of the mortgage agreement, BITB may exercise its power of attorney to execute a document to transfer the four boats into its name. If there is no such power of attorney provision in the mortgage agreement, then BITB will need to apply to the court seeking equitable relief in the form of specific performance. The court***

**may then convert the equitable mortgage into a legal mortgage conferring associated rights and powers.**

**BITB should ensure that the mortgage over four of VP's largest party boats is registered in VP's register of mortgages and charges pursuant to s.54 of the Companies Act and Maritime Authority Law since registration will give BITB priority over non-registered creditors.**

Commented [BT8]: 2

- b) JoBo ought to take steps to have the London arbitral award ("London Award") registered in the Cayman Islands so as to be able to enforce it against VP as if it were a judgment of the Cayman Islands courts. Given the Cayman Islands status as a British Overseas Territory, the UK has the power to extend treaties so as to apply to the territory (i.e., the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).**

**If there is, in fact, no prospect of VP being able to satisfy the London Award, then JoBo should not delay in commencing a new action under the common law rules in the Cayman Islands (given the limited scope of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision)).**

**JoBo ought to commence a new action in the Cayman Islands (within the six-year limitation period) based on the London Award as an unsatisfied debt. Such an action will be governed by the Grand Court Rules. The London Award will be enforceable against VP in the Cayman Islands since it:**

- I. is final;**
- II. the ICC in London had jurisdiction over VP (since VP submitted to the arbitration clause in the contract with JoBo);**
- III. the London Award was (presumably) not obtained by fraud;**
- IV. the London Award is not contrary to public policy in the Cayman Islands; and**
- V. the London Award was not obtained contrary to the rules of natural justice.**

**Once a local judgment has been obtained based on the London Award, the full range of domestic enforcement remedies are available to JoBo.**

Commented [BT9]: 2.5

- c) The unpaid employees of VP can make an application to wind the company up in order to seek recovery of the sums due to them from the company. VP will be considered unable to pay its debts if the petitioning employees are owed a sum exceeding KYD 100 and have served on VP demand requiring payment by the company of the sum due (plus interest).**

***If the sum due remains unsatisfied in whole or in part beyond 21 days from the date of service of the demand, then the unpaid employees may petition the court seeking the winding up of the company.***

***In an official liquidation, the sums due to the employees will rank as a preferential debt pursuant to s.141 (and Schedule 2) of the Companies Act.***

Commented [BT10]: 1.5

***d) VP was registered in accordance with the laws of the Cayman Islands. Further, The Grand Court has the power to make orders in support of foreign insolvency proceedings (which may be initiated against VP on the basis of the London Award obtained by JoBo) under Part XVII of the Companies Act. The Grand Court can provide the following forms of ancillary relief:***

Commented [BT11]: 1

- I. recognising the right of a foreign representative to act in the Cayman Islands on behalf of, or in the name of, VP;***
- II. enjoining the commencement or staying the continuation of legal proceedings against a VP;***
- III. staying the enforcement of any judgment against VP;***
- IV. requiring a person in possession of information relating to the business or affairs of VP to be examined by and to produce documents to its foreign representative; and***
- V. ordering the handover to a foreign representative any property belonging to VP.***

***e) VP may opt to make use the new statutory scheme found at Part V, section 91A-J of the Companies Act and seek the appointment of a restructuring officer ("RO") and entering into a scheme of arrangement via the presentation of a petition to the Grand Court on the grounds that:***

- I. it is, or is likely to become, unable to pay its debts; and***
- II. it intends to present a compromise or arrangement to its creditors or classes of creditors (including BITB, JoBo and the unpaid employees).***

***A moratorium (which has extraterritorial effect) is automatically triggered upon the filing of the petition, giving VP breathing space to work out how it can repay its liabilities to BITB, JoBo and the unpaid employees (for example) without the threat of formal liquidation proceedings being initiated against it in the meantime.***

Commented [BT12]: 2.5

***f) It is not yet clear whether, and to what extent, the Rackham family will continue to have a role in managing VP after an RO has been appointed. It can be***



**expected that the Grand Court will determine which powers will remain with the directors (if any) and which will be vested in the Ros in much the same way that the Grand Court used to do when appointing provisional liquidators over companies pursuant to s.104(3) of the Companies Act.**

Commented [BT13]: 1

- g) Before approving any proposed restructuring of VP, the Grand Court will consider issues of class composition, any jurisdictional issues, the adequacy of the proposed scheme documentation and notice.**

**The Grand Court must be satisfied that the scheme document and supporting statement contain all the information reasonably necessary to enable the scheme creditors (and/or shareholders) to make an informed decision about the proposed scheme.**

**A dissenting creditor (or shareholder) has the right to oppose the scheme at the sanction stage although its options will be limited.**

**The court will be concerned with:**

- I. Compliance with the convening orders;**
- II. Whether the majority fairly represent the class; and**
- III. 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]: 12.5

Commented [BT16]: TOTAL MARKS 45.5 OUT OF 50. Well done.

\* End of Assessment \*