



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.

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

In a voluntary liquidation:

(a) The company may cease trading where it is necessary and beneficial to the liquidation.

(b) The company must cease trading except where it is necessary and beneficial to the liquidation.

(c) The company must cease trading if it is necessary and beneficial to the liquidation.

(d) The company may cease trading unless it is necessary and beneficial to the liquidation.

Question 1.4

Select the correct answer.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

(a) A company incorporated in the Cayman Islands.

(b) A company with property located in the Cayman Islands.

(c) A company carrying on business in the Cayman Islands.

(d) Any of the above.

Question 1.5

Select the correct answer.

In a provisional liquidation, the existing management:

(a) Continues to be in control of the company.

(b) Continues to be in control of the company subject to supervision by the court and the provisional liquidator.

(c) May continue to be in control of the company subject to supervision by the provisional liquidator and the court.

(d) Is not permitted to remain in control of the company.

Question 1.6

Select the correct answer.

When a winding up order has been made, a secured creditor:

- (a) May enforce their security with leave of the court.*
- (b) May enforce their security with leave of the court provided the liquidator is on notice of the application.*
- (c) May enforce their security without leave of the court.***
- (d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.*

Question 1.7

Select the correct answer.

Any payment or disposal of property to a creditor constitutes a voidable preference if:

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

Question 1.8

Which of the following is not a preferential debt ranking equally with the other four?

- (a) Sums due to company employees.
- (b) Taxes due to the Cayman Islands government.
- (c) Amounts due to preferred shareholders.
- (d) Sums due to depositors (if the company is a bank).
- (e) Unsecured debts which are not subject to subordination agreements.

Question 1.9

Select the incorrect statement.

A company may be wound up by the Grand Court if:

- (a) The company passes a special resolution requiring it to be wound up.
- (b) The company does not commence business within a year of incorporation.
- (c) The company is unable to pay its debts.
- (d) The board of directors decides it is "just and equitable" for the company to be wound up.
- (e) The company is carrying on regulated business in the Cayman Islands without a license.

Question 1.10

Select the correct answer.

In order for a proposed creditor scheme of arrangement to be approved:

- (a) 50% or more representing 75% or more in value of the creditors must agree.
- (b) 50% or more representing more than 75% of the creditors must agree.
- (c) More than 50% representing more than 75% of the creditors must agree.
- (d) More than 50% representing 75% or more in value of the creditors must agree.

Commented [BT2]: 9/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

The Cayman Islands maintains central registries for certain types of assets - real estate, ships, aircraft, motor vehicles and intellectual property. For other types of security interests, a company is obligated to maintain a registry internally, though some companies do not comply with this obligation. For assets which may be registered in a central registry, doing so imputes notice to any third-party purchaser of the asset, such that they will take the asset subject to the registered security interest. Doing this allows a secured party to maintain their security by preventing a purchaser from obtaining a superior right to the collateral.

Commented [BT3]: 2 marks. Further detail from guidance text 5.3 required for full 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 Cayman Islands Grand Court has the power to assist foreign bankruptcy proceedings via Part XVII of the Companies Act. In order to invoke such assistance, the foreign representative must prove to the Court that the Court should use its discretionary powers to aid the foreign representative. The Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 (FBPR) provide the procedures by which the foreign representative can be recognized by the Court.

Commented [BT4]: Yes, but this doesn't really answer the question. Reference to section 242 and 'best assure an economic and expeditious administration of the debtor's estate' etc required. 1.5 marks.

Question 2.3 [maximum 3 marks]

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

The vast majority of foreign judgments that are recognized in the Cayman Islands are recognized under the common law. To achieve recognition, a litigant must follow the standard procedure for litigation and must show that (1) the judgment is final, (2) the foreign court had jurisdiction over the debtor, (3) the foreign judgment was not obtained by fraud, (4) the foreign judgement does not run afoul of domestic public policy, and (5) the foreign judgment was not obtained contrary to the rules of natural justice. Furthermore, the litigant must comply with the 6-year statute of limitations. Far less common are foreign judgments recognized under the Foreign Judgments Reciprocal Enforcement Act (1996). Because the statute requires the issuing jurisdiction to assure substantial reciprocity to judgments entered in the Cayman Islands, only the Superior Court of Australia enjoys the privileges of the Statute.

The Cayman Islands is not party to any applicable treaties.

Commented [BT5]: Succinct but correct. 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.

Section 99 of the Companies act provides the possibility for a liquidator to re-capture property dispositions (including grants of security) made after the deemed commencement of winding up. While some post-petition grants may be acceptable and even validated by the Court, post-petition grants of estate property which occurred when the company was insolvent, and which do not provide value to the estate are likely to be undone through compelled repayment.

If no petition has been filed at the time of the transfer, Section 99 (discussed above) will not apply and instead parties must rely on Section 145, which outlines voidable preferences. Section 145 incorporates a 6-month look back period from the deemed commencement of liquidation and applies when the dominant intention of the companies’ directors in making the transfer was to give the applicable creditor preference over other creditors. To give “preference” to a creditor simply means allowing that creditor to be in a better position than it would have been absent the transfer, so if the primary purpose of the transfer was some intention other than to give preference to the creditor (i.e. the preferential treatment was merely incidental to the dominant intention), then the transfer will be protected. However, transfers to related parties are deemed preferential.

*In addition to seeing their transfers unwound, directors may also find themselves to be personally liable for any losses they caused the company to incur as a result of their breach of fiduciary duty. Cayman Courts have found that when a company is insolvent, the directors’ duty is to act in the best interests of the company, which also requires consideration of the best interests of creditors. A breach of this duty may result in personal liability for the **director**.*

Commented [BT6]: Good. Don't forget sections 146-147. 7/9.

Question 3.2 [maximum 6 marks]

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

The statement above is misleading. Receivership and receivers can be helpful tools in the insolvency context. For example, many security instruments give the secured creditor the right to appoint a receiver when the debtor defaults. Utilizing a receiver to maintain and sell the charged assets offers an alternative, out-of-court procedure for secured creditors to realize on the collateral. This can be helpful and cost efficient for a creditor not only because court supervision is not required, but also because the receiver owes its duties to the creditor, not the debtor company.

Receivers might also be utilized in the insolvency of a Segregated Portfolio Company (SPC). Because the assets and liabilities of an SPC are separate from the assets of any other portfolio, sometimes the assets of a particular portfolio may be worth less than the liabilities and no additional assets can be reached. In this instance, a Court might appoint a receiver to act as a liquidator.

Commented [BT7]: Good. Specific reference to sections of statute and case law required for full marks. 4/6

QUESTION 4 (fact-based application-type question) [maximum 15 marks in total]

Vegan Patty Inc (VP) is a company registered in the Cayman Islands. It operates a fleet of party boats cross central America and the Caribbean. It was founded by the wealthy Rackham family over 40 years ago. The family continues to own and manage the business.

Between 2015 and 2019, VP had been rapidly expanding its operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to COVID-19 adversely affected its revenues.

VP has only managed to stay afloat for the past three years with the assistance of a very large loan from Blue Iguana Treasure Bank (BITB). BITB has lent VP USD 300 million (USD 180 million of which is secured by a mortgage over four of VP's largest party boats). The loan facility has now been exhausted. VP has also fallen behind on the monthly repayments to BITB.

This year, the tourism market picked up again; however, VP cannot afford to pay the ongoing costs associated with maintaining its fleet of ships (which include electricity and water costs for its huge dry dock facility, ongoing engineering and mechanical costs and also wages, pension and health insurance for its reduced team of employees) let alone find enough money to buy the vast quantities of rum it needs to keep the tourist customers suitably refreshed.

To make matters worse, VP commissioned Johnson & Boris Ltd (JoBo) to build seven more oversized party boats only a few months before the pandemic struck. VP attempted to wriggle out of the contract but, by virtue of an arbitration clause, the dispute was referred to the ICC sitting in London. Earlier this month, the ICC ruled that VP must pay damages of USD 50 million to JoBo within 45 days. VP has no prospect of being able to satisfy that award.

You are a Cayman Islands-based insolvency professional and have been approached to provide advice on the following:

- (a) What action can BITB take to protect its interests?**
- (b) What action can JoBo take to protect its interests?**
- (c) What action can the unpaid employees take against VP?**

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

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

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

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

In protecting its interests, BITB must act like both a secured creditor (as it relates to the \$180MM mortgage over the boats) and like an unsecured creditor (as it relates to the unsecured portion of the \$300 MM loan). Regarding the secured portion of BITB's claim, BITB may consider moving forward with enforcing its interest in the boats by taking possession of them and exercising its power of sale. Doing this acts to prevent further deterioration of the collateral, which is presumably sitting at poorly maintained docks given VP's lack of cash flow. With regard to the unsecured debt, BITB may consider petitioning for a winding up of VP in order to stem the loss of assets and compel repayment.

Commented [BT8]: 2

JoBo will have a harder time protecting its interest in its arbitration award because the Cayman Islands is not a party to any international treaties which compel it to recognize foreign arbitral awards. However, JoBo may consider filing suit in the Cayman Islands and domesticating its judgment with the Cayman courts. To do this, JoBo must rely on the common law process for the recognition of foreign judgments.

Commented [BT9]: 1/2 mark. Suggest revisiting study guide.

The employees of VP are unsecured, preferential creditors. As unsecured creditors, they may seek to wind up the company. In a liquidation, sums due to employees are considered preferential debts and will be paid prior to debts due to shareholders.

Commented [BT10]: 1

The Cayman Courts have jurisdiction over VP for three independently sufficient reasons: (1) VP is incorporated in the Cayman Islands; (2) VP carries on business in the Cayman Islands, and (3) VP has assets in the Cayman Islands.

Commented [BT11]: 1

Prior to August 2022, VP would have been forced to protect itself and its ability to reorganize through a provisional liquidation. However, through newly enacted law, VP may now protect itself and reorganize through the use of a restructuring officer. This is particularly beneficial because the filing of such an action automatically triggers an extraterritorial moratorium, giving VP the breathing room to reorganize under court supervision and with the help of a restructuring officer.

Commented [BT12]: 1.5

While it's not clear how the new legislation will play out, it is likely that the Rackham family may continue to exercise certain managerial powers, while other powers will be ceded to the restructuring officer, as determined by the court.

Commented [BT13]: 1

In sanctioning a restructuring scheme, the Court will consider (1) the company's compliance with the convening orders, (2) whether the majority fairly represents the class of creditors eligible to participate in the scheme, and (3) whether the arrangement would be reasonably approved by an honest member of the class convened, taking into account other reasonable alternatives.

*** End of Assessment ***

Commented [BT14]: 2

Commented [BT15]: 9/15. More detail and attention needed for full marks.

Commented [BT16]: TOTAL MARKS 35.5 OUT OF 50