



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.**

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

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 [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?

Ownership registers only exist in the Cayman Islands for real estate, ships, aircraft, intellectual property and motor vehicles. A creditor can register its mortgages and charges in these registers. Registration means that a third party purchaser of the charged assets is on notice of the creditor's interest and acquires the charged asset subject to the creditor's interest. A secured creditor is also given priority over non-registered creditors.

Section 54 of the Companies Act requires a company to maintain a register of mortgages and charges which contains any security interests. The register of mortgages and charges must be maintained by the company's registered office and is open to any member or creditor of the company for inspection. A company's failure to update its register of mortgages and charges does not invalidate any security interests not recorded. It is best practice for a lender to ensure that a company's register of mortgages and charges is updated to reflect its security interests.

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 a foreign bankruptcy proceedings pursuant to section 241 of the Companies Act. The Grand Court will exercise its discretion to assist where it will best assure an economic and expeditious administration of the debtor's estate:

- 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.*

Question 2.3 [maximum 3 marks]

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

Commented [BT3]: 2.5 marks. Further detail from guidance text 5.3 required for full marks.

Commented [BT4]: Section 242. 3.5 marks.

While the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the 1996 Act) provides a legal framework for the recognition of foreign judgements, it is limited. The 1996 Act provides that the country where the judgment originates from must assure substantial reciprocity of treatment in relation to Cayman Islands judgments. The 1966 Act has only been extended to judgments from the Superior Court of Australia.

The enforcement of foreign judgements in the Cayman Islands can be done through common law. Both monetary and non- monetary judgments can be enforced at common law. The following are the mandatory requirements for the enforcement of a foreign judgment at common law:

- a. Judgment is final;
- b. Foreign court had jurisdiction over the debtor;
- c. 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.

A new action based on the foreign judgment can also be commenced in the Cayman Islands.

The limitation period of 6 years applies to both common law and the 1996 Act.

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.

In the absence of a statutory prohibition on insolvent trading, the following are the existing options in the Cayman Islands:

a. Avoidance of property disposition

Pursuant to section 99 of the Companies Act, any disposition of a company's property made after the commencement of the winding up will be void if a winding up order is made. The commencement of a winding up is the date upon which the petition is filed. The liquidator can make an application for the return of the asset.

The court can approve post-petition grants by way of a validation application. As provided in *Re Fortuna Development*, the court would usually grant a validation

application where the company is solvent and it is satisfied that an intelligent director acting reasonably would come to that decision.

b. Voidable preference

Pursuant to section 145 of the Companies Act, any payment or disposal of property to a creditor is voidable preference if it occurred 6 months before the petition is filed when the debtor is unable to pay its debts and the dominant intention of the company's director was to give the creditor a preference over other creditors. If the dominant purpose is to making a payment in good faith it may not be classed as a voidable preference even though a creditor is preferred.

A disposition to a related party will be deemed to have been made with a view to giving preference. A voidable preference is voidable and the liquidator may request that the asset be returned and proved.

c. Avoidance of dispositions made at an undervalue

Pursuant to section 146 of the Companies Act a transaction in which property is disposed at an undervalue with the intention of wilfully defeating an obligation to a creditor is voidable upon an application by the liquidator. An undervalue is where there was no consideration or the consideration which in money or money's worth is significantly less than the value of the property. The application must be brought by the liquidator within 6 years of disposal of the property.

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.

O.30 of the GCR provides for the appointment of receivers generally while O.51 provides for the appointment by way of equitable execution. The GCR provides for the appointment of a receiver to collect money and the execution of a contract or a document title.

Section 224(1) provides for the appointment of a receiver over a portfolio of an SPC which is unable to discharge its debts. The role of the receiver is similar to that of a liquidator. A receivership order may be made if the SPC is in the process of being wound up and shall cease to be of effect upon the commencement of the winding up order of the SPC.

A receiver can be appointed by the holder of a fixed or floating charge if the fixed or floating charge provides of the appointment. The receiver will be an agent of the company but is required to act in the best interest of the holder of the fixed or floating charge. The receiver is not supervised by the court in this scenario. The charge document usually includes the power of sale and the receiver is required to realise the value of the charged asset for the benefit of the holder of a fixed or floating charge.

Commented [BT7]: Good albeit a slightly fuller discussion 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?

Given that BITB is a secured creditor, BITB can enforce its right. If BITB's mortgage over the boats is a legal mortgage then BITB can take possession of the boats, appoint a receiver and exercise its right of sale. If the mortgage is an equitable one without a power of attorney in favour of BITB, an application will need to be made to the court to covert the equitable mortgage to a legal one.

As the debt is more than the secured asset, BITB will be an unsecured creditor for the 120 million.

Commented [BT8]: 1.5

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

JoBo can seek to have its arbitration award enforced in the Cayman Islands. Once the order is enforced the full range of domestic enforcement remedies are available to JoBo including the presentation of a winding up petition.

Commented [BT9]: 1.5

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

If VP is placed in liquidation, the unpaid employees debt which is a preferential debt will be paid from the realised assets of VP.

Commented [BT10]: 1

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

Yes, the Grand Court has jurisdiction over VP because it is incorporated in the Cayman Islands.

Commented [BT11]: 1

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

VP Can make an application for the appointment of a Restructuring Officer pursuant to section 91B(1) of the Companies Act. VP may present the petition on the grounds that it is or likely to become unable to pay its debts and it intends to present a compromise or scheme of arrangements to its creditors. A extra-territorial moratorium will be triggered which will prevent any action domestic or foreign from being initiated without the leave of the court. The moratorium will not have an effect on the BITB's secured assets.

Commented [BT12]: 2

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

Yes, Rackams can continue running VP if it remains outside of a liquidation. If a Restructuring Officer is appointed, Rackams can continue to remain in control subject to oversight from the Restructuring Officer.

Commented [BT13]: 1/2

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

Before approving a restructuring, the Grand Court will need to ensure that the proposed restructuring is fair and will consider whether:

- a. The restructuring complies with the convening order;
- b. The majority fairly represent the class; and
- c. 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]: 9.5

* End of Assessment *

Commented [BT16]: TOTAL MARKS 39.5/50