



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

CAYMAN ISLANDS

This is the summative (formal) assessment ***for*** Module 5C ***of this course and must be submitted by all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 5C. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment5C]. An example would be something along the following lines: 202223-336.assessment5C. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 9 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Select the correct answer.

Once an application for a restructuring officer is filed:

- (a) No action may be commenced against the company without leave of the court.**
- (b) No existing action may be continued against the company without permission of the provisional liquidator.**
- (c) Legal proceedings may be commenced or continued against the company without leave of the court.**
- (d) No action may be commenced against the company.**

Question 1.2

Which of the following is not available to a debtor company in the Cayman Islands?

- (a) Appointment of a receiver.**
- (b) Court-supervised liquidation.**
- (c) Official liquidation.**
- (d) Deed of Company Arrangement.**

Question 1.3

Select the correct answer.

In a voluntary liquidation:

- (a) *The company may cease trading where it is necessary and beneficial to the liquidation.*
- (b) **The company must cease trading except where it is necessary and beneficial to the liquidation.**
- (c) *The company must cease trading if it is necessary and beneficial to the liquidation.*
- (d) *The company may cease trading unless it is necessary and beneficial to the liquidation.*

Question 1.4

Select the correct answer.

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

- (a) *A company incorporated in the Cayman Islands.*
- (b) *A company with property located in the Cayman Islands.*
- (c) *A company carrying on business in the Cayman Islands.*
- (d) **Any of the above.**

Question 1.5

Select the correct answer.

In a provisional liquidation, the existing management:

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

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

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

Question 1.6

Select the correct answer.

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

(a) May enforce their security with leave of the court.

(b) May enforce their security with leave of the court provided the liquidator is on notice of the application.

(c) May enforce their security without leave of the court.

(d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.

Question 1.7

Select the correct answer.

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

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

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

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

(d) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant

intention of the company's directors was to give the applicable creditor a preference over other creditors.

Question 1.8

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

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

Question 1.9

Select the incorrect statement.

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

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

Question 1.10

Select the correct answer.

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

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

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

Commented [BT1]: 10/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

[With respect to real estate, ships, aircraft, motor vehicles and intellectual property, there are ownership registers in Cayman Islands. These registers are kept at registered office. If these assets are registered, a third-party purchaser of the relevant assets will be regarded as one receiving the notice of any such interest and will obtain the asset subject to the secured creditor's interest. In addition, the secured creditor has the priority over non-registered creditors by the registration.]

Commented [BT2]: Some understanding but confused and lacking detail. Suggest re-reading 5.3 guidance text. 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?

[Yes, the Cayman Islands Grand Court has the power to make orders in support of foreign insolvency proceedings. This is based on Part XVII of the Companies Act. To exercise the Cayman court's discretion, the foreign representative application must satisfy the Cayman that such discretion is appropriate.]

Commented [BT3]: Doesn't answer the question. Reference to section 242 and criteria by which court tries to ascertain how to 'best assure an economic and expeditious administration of the debtor's estate' 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 co-operative approach has been adopted as recognition of foreign judgements. Although Cayman Islands has not introduced any international treaties for such recognition, there is the Foreign Judgements Reciprocal Enforcement Act. However, this act has been currently available to the Superior Courts of Australia. Therefore, foreign judgements are enforceable at common law if the following requirements are met:

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

Commented [BT4]: Correct but a little light on detail. 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.

[Yes, either of them is possible. If directors breach their fiduciary duty, an official liquidator can claim the damage against directors on behalf of the company. In addition, voidable preference is available. Disposals to a “related party” is regarded as preference one. The definition of the related party is a person who has the ability to control the company or exercise significant influence, i.e., a director. Therefore, a liquidator can ask the court to void such preference payments. To obtain the order, the liquidator has to prove the amount of its claim. On the other hand, if the dominant purpose of the disposition made to directors is not to put directors in a better position than it otherwise would have been, such disposition may not be regarded as voidable preference.]

Commented [BT5]: OK, but answer should deal with the common law solution too plus sections 145, 146 and 147, and even section 99. 4/9.

Question 3.2 [maximum 6 marks]

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

[Receivers may be appointed by the Grand Court to collect money or to execute some other action. Strictly speaking, this situation is not related to the insolvency situation mentioned under the Companies Act and Companies Winding up Rules. For instance, if a Segregated Portfolio Company (“SPC”) is in process of being wound-up, a receivership order may not be made. If such has been made, it shall be ceased. However, in SPC, a receiver can play the similar role to a liquidator because a receivership order may be made;

- (i) to close down the business of, or attributable to, the segregated portfolio; and*
- (ii) to distribute the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse.*

This order is based on the fact that a portfolio of SPC has the inability to pay debts to all creditors in terms of the portfolio. These functions of the receivership are analogous to a liquidator.]

Commented [BT6]: Good but lacking the structure, clarity and detail needed for more marks 3/6. See guide 6.4.

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?

[With respect to (a), BITB has the legal mortgage over four of VP's largest party boats in relation to the part of loan, i.e., USD 180 million. Therefore, BITB can enforce its security without the leave of the Cayman court and without the reference to the liquidator. In addition, the stay does not cause any affect to the secured creditor.

With respect to (b), JoBo has the lien over seven more oversized party boats. As a result, JoBo can keep such party boats until VP completes to pay debt against JoBo even though VP has the possession of these party boats.

With respect to (c), unpaid employees have the priority except for the secured creditors and liquidation expenses. If VP does not have enough fund to pay such priority debts in full, they abate in equal proportions.

With respect to (d), the Cayman Islands Court has the jurisdiction in relation to companies incorporated in the Cayman Islands.

With respect to (e), there are provisional liquidation, restructuring officer regime or schemes of arrangement as the corporate rescue.

With respect to (e), if provisional liquidation is filed, provisional liquidators will be appointed. However, her/his powers are limited. As a result, VP's management can continue to have the control VP and he can lead to propose and agree a compromise or arrangement between VP and creditors like liabilities restructuring. Likewise, VP has the option to reach such arrangements with its creditors without provisional liquidation, i.e., VP's management keeps the entire control. On the other hand, once the restructuring officer regime is filled, the restructuring officer is appointed. She or he has the powers which designated by the court. Therefore, the VP management may lose its control.

With respect to (g), the schemes of arrangement is used with the provisional liquidation or restructuring officer regime as the corporate rescue. To obtain the approval of the arrangement from the court, the court will consider (i) compliance with the convening orders, (ii) whether the majority fairly represent the class and (iii) whether the arrangement is such that an intelligent, honest member of the class convened, acting in their own interest, might reasonably approve it.]

*** End of Assessment ***

Commented [BT7]: 2

Commented [BT8]: 0

Commented [BT9R8]: This is about recognition and enforcement of arbitral awards

Commented [BT10]: 1/2. Preferential creditors

Commented [BT11]: 1/2. Why?

Commented [BT12]: 1. Far too brief, I'm afraid. The stay of claims is key.

Commented [BT13]: This is the point. 1 mark.

Commented [BT14]: 2

Commented [BT15]: 7/15

Commented [BT16]: TOTAL MARKS 29.5/50