



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 [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?

Yes, the Cayman Islands has ownership registers for land, ships, aircraft and other assets which are centrally maintained. Registering security taken over an asset is very important to ensure priority, as well as to ensure that any potential third party purchaser is on notice of the security interest. However, there is no public security registration system for other types of assets. This means that the lender should be careful when taking security to insist the company's statutory registers are updated and the security is noted. Although this does not in and of itself create priority it will be deemed to put third parties on notice and reduces the likelihood of the a bona fide purchaser for value being able to obtain the asset in spite of the existence of the security interest.

Commented [BT3]: Good but a little more detail required for full marks. 2.5 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 Cayman Islands have not implemented the UNCITRAL Model Law (although they do recognise and follow most of its principles on the basis of comity) and does not have any bilateral treaties governing how assistance should be given to foreign representatives. Instead, the Grand Court's powers to assist and to make orders in respect of foreign insolvency proceedings are provided for in Part XVII of the Cayman Islands Companies Act (Act) which governs 'International Cooperation'.

It permits the Cayman Islands courts to make a host of ancillary orders upon the application of a foreign representative in the Cayman Islands (s241 of Act). These forms of ancillary relief include recognition to act on behalf of or in the name of a debtor, preventing or staying proceedings against a debtor, staying enforcement against a debtor, requiring a person to provide information or to submit for examination to the foreign representative, or handing over property belonging to the debtor.

Given it is a leading international financial centre, the Cayman Islands courts are well versed in dealing with cross border insolvency issues and will be pragmatic in deciding what assistance to grant foreign representatives. When determining what orders to make, the Cayman Islands courts will consider what course of action best serves the expeditious and cost-effective administration of the debtor's estate and will take account of the following:

- The just treatment of all creditors regardless of where they are situated;*
- That Cayman Islands creditors are not excessively prejudiced or inconvenienced by the processing of their claims in foreign proceedings;*
- Preventing fraudulent or preferential dispositions from the debtor's estate;*

Commented [BT4]: Yes, section 242. 3 marks.

- *The ultimate distribution of the debtor's estate among its creditors in accordance with the statutory order of priorities;*
- *Ensuring that valid security interests are recognised and can be enforced;*
- *That foreign taxes and penalties are not levied from the Cayman Islands estate without a valid legal basis; and*
- *Comity.*

In addition to the guidance in Part XVII of the Act, the Cayman Islands will be governed by common law principles and can use their discretion in deciding what relief to grant to foreign representatives and what is in the best interests of the creditors' with a view to maximising or preserving the debtor's asset within the Cayman Islands.

Question 2.3 [maximum 3 marks]

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

The Cayman Islands has not entered any international treaties relating to the enforcement of foreign judgments, nor is it a signatory to the Hauge convention. The only statutory scheme governing recognition of judgments is the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) which does provide for a statutory scheme of recognition and enforcement where there is reciprocity regarding the treatment of Cayman Islands judgments. However, to date these provisions only extend to the Superior Courts of Australia so are of limited application. To avail of this provision the judgment must be (i) final, (ii) a monetary judgment, and (iii) made after enactment in the relevant country.

*Given the lack of legislation and statutory guidance, most foreign judgments are enforced under common law by commencing new proceedings in the Cayman Islands based on the foreign judgment as an unsatisfied foreign debt. However, non-monetary judgments can also be enforced as determined by the Grand Court in *Bandone -v- Sol Properties* ([2008] CILR 3010). As new proceedings have to be initiated, they will be initiated under the Grand Court Rules and will be governed by Cayman Islands law. The requirements for enforcement of a foreign judgment at common law are:*

- *Judgment must be final;*
- *Foreign court must have had jurisdiction over the debtor;*
- *The judgment must not have been obtained by fraud;*
- *The foreign judgment must not be contrary to Cayman Islands public policy, or the principles of natural justice;*

Once a judgment is obtained in the Cayman Islands recognising the foreign judgment then it can be enforced using any available means under Cayman Islands law. For a liquidated sum, this could include a charging order or garnishee order. One important point to note when considering enforcement of a foreign judgment is the six year

limitation period which applies to both common law enforcement and the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) and which runs from the date of the final judgment.

The Foreign Arbitral Awards Enforcement Act (1997 Revision) also gives domestic effect to the New York Convention in the Cayman Islands as regards the enforcement of arbitral awards. Following the enactment of the Arbitration Act, 2012 in July 2012, the jurisdiction for the recognition and enforcement of foreign arbitral awards has been extended and arbitral awards from any foreign state can now be enforced. Once recognised, the applicant can use the Cayman Islands legal system to enforce the award within the Cayman Islands.

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.

One omission from the Cayman Islands insolvency regime is a prohibition on wrongful or insolvent trading. However, in spite of there being no statutory provision addressing this, there are a number of options available to creditors or to a court appointed liquidator to deal with such a scenario, including by seeking to have the former directors held personally liable for any loss caused to the company on foot of their actions.

The Cayman Islands have confirmed the common law principle that, where a company is insolvent, the director's duty to act in the best interest of the company requires them to have regard to the interest of the company's creditors. This was confirmed in the Cayman Islands in Prospect Properties -v- McNeill [1990-91] CILR 171) and is now well settled. This is a logical application of the law as if, for example, the directors continue to trade and incur further debt when they know the company is insolvent and unable to pay its debts, they are harming the creditors by increasing the number of creditor claims which will need to be paid from the insolvent estate and reducing the potential dividend or return that creditors may receive. This is why 'wrongful' or insolvent trading is part of many common law statutory insolvency schemes and why directors must be very careful and, if necessary, take legal advice when the company is financial difficulty and, particular, enters the 'zone of insolvency'.

Despite having no statutory prohibition governing insolvent trading, there are a number of options available to any court appointed liquidator or to creditors to mitigate the harm caused by the directors actions. If it can be proven the business of the company was carried on with an intent to defraud creditors and that the directors

were on notice of this, this would amount to fraudulent trading under s17 of the Act. In those circumstances, the court could make an order requiring anyone who was a party to such conduct to make such a contribution to the company's assets as they deem necessary. However, the liquidator needs to establish there was an intent to defraud which is a high threshold.

Commented [BT6]: 147?

If there was no such intention, or it cannot be proven, it is open to the liquidator to bring an action on behalf of the company if it appears they have breached their fiduciary duty to the company and, if they traded recklessly while insolvent, the creditors. If successful, the directors could be held personally liable for any loss caused to the company as well as damages if the court deems them appropriate.

In terms of unwinding or 'clawing back' any transactions, this may be difficult if they involve third parties who were not on notice of company's financial difficulties. However, if the liquidator can prove that a transaction constituted a voidable preference under s145 of the Act, or was made at an undervalue within the meaning of s146, the transaction will be voidable and can be unwound. For a voidable preference, the transaction must be within 6 months of the commencement of the liquidation and occur at a time when the company is unable to pay its debts. In addition, it must be done for the dominant purpose of preferring one creditor over another. The test to be applied was considered in detail by the Cayman Islands Court of Appeal and the Privy Council in *Re Weaving Macro Fixed Income Fund (In Liquidation)*. It is notable also that there will be a presumption that transactions with connected parties are done with an intention to prefer. In order to have a transaction clawed back on the basis it was made at an undervalue, in addition to proving the disposition was at an undervalue, the applicant needs to show it was done to defeat an obligation owed to another or other creditors (i.e. to defraud).

Commented [BT7]: 8/9

Question 3.2 [maximum 6 marks]

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

Even though they are not explicitly mentioned in the Act or the Companies Winding Up Rules, this is not necessarily correct. In any insolvency scenario provided for under Cayman Islands legislation, a security holder is free to enforce their security outside of the insolvency or restructuring. This means that a security holder is free to appoint a contractual receiver in accordance with the terms of the security document, notwithstanding that a liquidator or Restructuring Officer may be already appointed. Providing the security is valid and there are no questions over its effectiveness, any such receiver will be free to deal with the secured asset prescribed in the security, which in many cases permits the sale of the secured asset.

The Grand Court Rules (GCR) also provides that receivers can be appointed by the Cayman Islands courts for a variety of reasons. Order 30 GCR governs the appointment and duties of receivers generally. Order 45 GCR provides that a receiver can be appointed to enforce a court order for the payment of money, and Order 51 states that

receivers can be appointed by way of equitable execution. These can be very effective methods of enforcing monetary awards or sums owing, for example an arbitral award made in another jurisdiction.

In addition to contractual receivers and the scenarios described above, the segregated portfolio company (SPC) process uses receivership as a method of winding down and terminating insolvent 'cells' or segregated portfolios where the other portfolios in the SPC are viable. Section 224(1) of the Act allows a receiver be appointed to the particular portfolio and manage the business assets of that portfolio only in order to conduct the orderly termination of the portfolio and distribution of its assets. However, if a liquidator is appointed to the SPC, the receiver appointed to the specific segregated portfolio will no longer have any power to act in respect of the portfolio.

Commented [BT8]: 6/6

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) BITB has a secured debt of USD180 million and an unsecured debt of USD120 million. BITB is free to enforce its security over the four charged boats at any point, even if VP is wound up or seeks to appoint a restructuring officer. If BITB wants to take actions to protect its interests, it should enforce its security and look to take possession of the charged boats as soon as possible so that they cannot be sold or in case they were offered to another party as security. Alternatively, given that we are told that the tourism market has started to pick up again, it may be worth having explanatory discussions with VP to see if there is any prospect of working with its creditors to restructure its debts. This would obviously require buy in from all creditors and would only effect the unsecured portion of BITB's debt but could result in a greater return on that part of the debt than a liquidation which appears to be the likely alternative.

Commented [BT9]: 2

b) The Foreign Arbitral Awards Enforcement Act (1997 Revision) gives domestic effect to the New York Convention in the Cayman Islands. As noted above, the Arbitration Act, 2012 extends the jurisdiction for the recognition and enforcement of foreign arbitral awards and arbitral awards from any foreign state can now be enforced (although a decision of the ICC in London would have been enforceable in any event under the 1997 Act). Accordingly, JoBo should apply ex parte to have its arbitral award enforced in the Cayman Islands. It can then seek to have the arbitral award enforced by any means permitted in Cayman, including by seeking a charging order or the appointment of a receiver under the GCR.

Commented [BT10]: 2.5

c) The unpaid employees will, naturally, be very concerned by VP's situation. Luckily for them, sums due to them in respect of unpaid wages, pension contributions and health insurance, are classified as preferential debts in a winding up. However, that process can be slow. I would advise them to send a formal letter of demand in respect of all contractually owed wages pension

Commented [BT11]: 1

and / or health insurance contributions. This may prompt VP to engage and perhaps pay some or all of the outstanding wages, if not, the employees could file a petition seeking to have VP wound up and would ultimately enjoy priority (following the payment of the liquidators costs and expenses) in the liquidation.

d) *Yes, as VP is a Cayman registered company.*

Commented [BT12]: 1

e) *Yes. Until recently, we would have advised VP to bring a petition seeking to have the company put into provisional liquidation. This would have allowed the company time to consider a potential restructuring while benefiting from a moratorium. While it is still possible to appoint PLs, if the purpose is to take advantage of a moratorium while investigations are made regarding the viability of a restructuring or scheme of arrangement, this should now be done by appointing a Restructuring Officer (RO) under the new Part V, sections 91A-J of the Act. This will afford VP a moratorium from the date of filing the petition and enable the appointed RO to explore the possibility of entering into a compromise or scheme of arrangement so that the VP can continue to trade and the creditors can hopefully receive more than they would in a liquidation scenario.*

Commented [BT13]: 2.5

f) *Possibly, the powers and functions of the restructuring officer will be determined by the Grand Court in the order appointing them and could enable the Rackhams to play a part in the running to VP during the restructuring process.*

Commented [BT14]: 1

g) *Ultimately, the court will consider what is in the best interests of the body of creditors as a whole. If, after the appointment of the RO, VP are successful in having the various creditors agree to enter into a Cayman Islands law governed scheme of arrangement in order to compromise their debts, they will need to apply for a convening hearing, hold the necessary meetings with the scheme creditors to ensure that all the classes of creditors vote on and approve the scheme, and then obtain court approval at the sanction hearing. Assuming the court has approved the form of notices, the composition of the classes of creditors, the explanatory statement and the other required scheme documents at the convening hearing, and that the scheme was approved by the requisite majorities at the meetings, the court will primarily be concerned with the following at the sanction hearing:*

- That all of the requisite orders made at the convening hearing were followed;*
- That the majority fairly represents each class of creditors; and*
- Whether the scheme, having regard to the likely alternatives, is such that an intelligent, honest member of the class, acting in their interest, might reasonably approve it.*

Commented [BT15]: 2

When considering the alternatives and the appropriate comparator in the scheme documents, this will often be (and seems likely to be in VP's situation) liquidation.

Commented [BT16]: 12

* End of Assessment *

Commented [BT17]: 43.5/50