



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?

[Security may be taken over immovable and/or movable assets in the Cayman Islands. A creditor that has security is entitled to enforce on its security without the leave of the Court and without reference to a liquidator. There is no stay on enforcement by secured creditors as is the case in Chapter 11 proceedings.]

Security over immovable property may be taken as follows:

- **Mortgage**
 - o *Security over real property is granted by way of a mortgage, either a legal mortgage or an equitable mortgage*
 - *Legal mortgages over certain types of property must be created by deed and be validly executed. Additionally, the Register of Lands must be updated. Registration puts third parties on notice and ensures that mortgages has priority over them.*
 - *Equitable mortgage can be taken in writing and can usually be created by deed*
- **Fixed charge**
 - o *This gives a creditor the right to take possession of charged property if a borrower defaults.*
 - o *Fixed charge must be in written and are created by deed]*

For movable property, the most common forms of security are:

- **Mortgage**
 - o *This is commonly taken as security over ships and aircraft. These need to be registered on the vessel or aircraft register*
 - o *Mortgages over shares are also common. These are achieved by way of an agreement to create a mortgage over shares. The entry of the secured creditor's name into the register of members as the holder of the shares and the deposit of the relevant share certificate, if any, with the secured creditor.*
- **Fixed Charge** - *this must also be written and usually be created by deed*
- **Floating charge** - *This is a charge take over a class of assets that fluctuate on a daily basis.*
- *Often a secured creditor will take a fixed charge over specific assets together with a floating charge over all other assets not covered by the fixed charge. In the event of an event of default a floating charge will crystallise and convert into a fixed charge which attaches over a specific asset.*

- *Pledge - this is a legal form of security created by contract and perfected through delivery of possession of the asset to the secured creditor.*
- *Lien - a lien is similar to a pledge and gives a creditor a right to keep possession of an asset belonging to a debtor.*

The Cayman Islands has ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property. These registers are centrally maintained. Mortgages and charges should be updated and registered in the registers. The effect of registration is that a third party purchaser of a charged asset will be deemed to have notice of such interest and will therefore acquire the asset subject to the secured creditor's interest. Registration also gives a secured creditor priority over non-registered creditors.

There is not public security registration regime in the Cayman islands for other types of assets. A creditor must therefore take adequate steps to investigate whether an asset is encumbered.

Section 54 of the Companies Act requires that security interests be entered in the register of mortgages and the charges of the debtor company. The register is usually maintained by the Company at its registered office. Failure to update a register of mortgages and charges does not invalidate security interests that are not recorded.

*Registering a security interest in the company's register of mortgages and charges does not create priority, however a register is open for inspection by any member of the company or creditor and therefore registration does put third parties on notice of the existence of a security. A lender should therefore register its security when it lends to a **Company**.*

Commented [BT2]: 3 marks

The law governing the priority and perfection of security interests will be determined by the location of the asset.]

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 Grand Court has power to assist in foreign bankruptcy proceedings. The powers of the Grand Court of make decisions foreign insolvency proceedings are provided for in Part XVII of the Companies Act. In the Cayman Islands, there are no threshold tests for the granting of assistance. There are also no automatic rights based on the centre of the main interests (COMI) of the debtor.

Foreign representatives are required to satisfy the Cayman 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 relief in the following instances:

- *Recognising the right of a foreign representative to act on the islands on behalf of or in the name of a debtor*
- *Enjoining the commencement or staying continuation of legal proceedings against a debtor*
- *Staying the enforcement of any judgement against a debtor*
- *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 representatives*
- *Ordering the hand-over, to a foreign representative of any property belonging to a debtor.*

The Grand Court exercises its jurisdiction, the court assure an economic and expeditious administration of the debtors assets in order to achieve:

- *The just treatment of all holders of claims, wherever they are domiciled, in accordance with established principles of natural justice*
- *Protection of claim holders in the Cayman islands against prejudice and inconvenience in processing of claims in foreign proceedings*
- *Prevention of preferential or fraudulent dispositions of property in the debtor's estate*
- *The distribution of the estate among creditor substantially in accordance with the statutory order of priority*
- *Recognition and enforcement of security interests created by the debtor*
- *Non-enforcement of foreign taxes, fines and penalties*
- *Comity, mutual recognition and cooperation concerning legal decisions.]*

Commented [BT3]: Yes, section 242 Companies Act. 3 marks.

Question 2.3 [maximum 3 marks]

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

[The Grand Court adopts a co-operative approach to ensure that an effective winding-up and protection of the interests of creditors, wherever the creditors are situated.

It is important to note that the Cayman Islands has not entered into any international treaties for the reciprocal recognition of foreign judgements. The Caymans Islands is also not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Aviation Matters. To date the provisions of the Act have only been extended to judgements from the Superior Courts of Australia, which is governed by Order 71 of the Grand Court Rules. Since the statutory provisions are limited, judgements are recognized and enforced at common law.]

Since there is limited application of the Foreign Judgements Reciprocal Enforcement Act 1996, the enforcement of foreign judgements is usually achieved by commencing a new action in the Cayman Islands based on the foreign judgment as an unsatisfied debt or other obligation.

Judgements, both money and non-money judgements are enforceable at common law. The mandatory requirements for enforcement of a foreign judgement at common law are:

- *The judgement is final*
- *The foreign court had jurisdiction over the debtor*
- *The foreign judgement was not obtained by fraud*
- *The foreign judgement if not contrary to the public policy of the Cayman Islands*
- *The foreign judgement was not obtained contrary to the rules of natural justice.*

Commented [BT4]: 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.

[
Avoidance of property dispositions

Section 99 of the Companies Act prescribes that any dispositions of a company’s property made after the deemed commencement of the winding-up will be void if a winding up order is subsequently made, unless they are validated by the Grand Court. The commencement date will be the date on which the petition was filed, rather than the date of the order.

A liquidator is entitled to apply for appropriate relief to require the repayment of the funds or the return of the asset. The court also has the power to validate post-petition grants of security, retrospectively or prospectively, therefore a company should seek validation orders, for example in the event new lending has been provided.

The court could also validate arrangements where the company is solvent and provided it is satisfied that an intelligent and honest director acting reasonably would arrive at the same decision. The court may however not endorse such an arrangement where the company is insolvent, unless it is shown that the grant of security was for the benefit of the company and enhances value for the creditors.

If no petition has been filed, any transaction not caught under section 99 (i.e. not validated by the court as required above may be subject to additional clawback as a voidable preference.

Voidable preference

Under Section 145 of the Companies Act, payment or disposal to a creditor is a voidable preference if:

- *It occurs in the six months before the deemed commencement of the company’s liquidation when the company is unable to pay its debts*

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

A preference is given to creditors where the creditors are put in a better position than they would otherwise have been. If the purpose of a payment or granting the security was a different purpose, for example, pay an essential service provider, the transaction might not be classed as voidable even if the collateral effect is to prefer the creditor in question. A dominant intention to prefer must be present.

Where a disposition is set aside as a voidable preference, a liquidator may request the Grand Court to Order a creditor to return the asset and prove in the liquidation for the amounts of its claim.

Transactions at Undervalue

Under Section 146 of the Companies Act, where a property is disposed of at an undervalue and with the intention of wilfully defeating an obligation owed to a creditor, that is an intent to defraud, the transaction is voidable on application of the liquidator.

The creditor or liquidator seeking to have the disposition set aside must establish an intent to defraud. An application must be within six years of the disposal.

Fraudulent trading

Where a business was carried on with the intent to defraud creditors, or for any fraudulent purpose, a liquidator may apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company's assets as the Court thinks proper.]

Commented [BT5]: Good, but don't forget the common law solution (breach of fiduciary duty) 7/9

Question 3.2 [maximum 6 marks]

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

[Despite not being explicitly mentioned in the statutory provisions dealing with insolvency, receivers may be appointed by the Court for purposes of collecting money, for example rent, or to carry out some other act (for example, execution of a contract or a document of title).

Order 30 of the Grand Court Rules deals with the appointment and duties of receivers generally. Order 45, which deals with enforcement of judgements and orders generally states that receivers may be appointed to enforce court orders for the payment of money.

Order 51 of the Grand Court Rules also provides for the appointment of receivers by way of equitable execution.

Receivers are provided for in statute in respect of Segregated Portfolio Companies, which are a regular company which remains as a single entity within a larger company and is permitted to create separate portfolios for allocation of different types of assets and liabilities. Each portfolio is ring-fenced, by statute, from the assets and liabilities in other portfolios.

Where the Grand Court is satisfied that the SPC's assets attributable to a particular portfolio of the company are likely to be insufficient to discharge the claims of the creditors, a receivership order may be made in respect of that particular portfolio. The role is similar to a liquidator.

A receivership order directs that the business and assets or, or attributable to, a segregated portfolio must be managed by a receiver. A receiver in such an instance would be appointment for purposes of:

- The orderly closing down of the business or, or attributable to, the segregated portfolio,
- The distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to the distribution.

The main purpose of receivers in an insolvency context is that receivership may offer an alternative course of action for certain creditors.

Receivers can be appointed without the involvement of court pursuant to rights in a security instrument. For example, a holder of a fixed or floating charge can, if the charging document specifically provides for it, appoint a receiver over the company's charged assets if a debtor defaults on its obligations.

The receiver in this case would act under the powers set out in the charge document, which will typically include a right of sale. The receiver will generally realize the value of the charged asset and repay the creditor the amount of its unpaid debt. In this case, a receiver is not supervised by the court and usually owes its duties to the creditor rather than to the debtor company.

Therefore, despite not being explicitly mentioned in the insolvency provisions, receivers still have powers in the Cayman islands]

Commented [BT6]: 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) What action can BITB take to protect its interests?

In the Cayman Islands, where a creditor has security over an asset, the creditor can enforce their security over the asset without necessarily needed the sanction of the court.

In case their debt is more than their security, the creditor can file an unsecured claim against the Company.

Commented [BT7]: 2

BITB can therefore look to enforce on the debt and seek to recover the debt that is recoverable by selling the four boats which secure part of the debt
Subsequently, in case there is still a shortfall, BITB can issue a demand against VP seeking payment of the debt. In case VP is not able to settle the debt, BITB can consider presenting a winding up petition against the Company on the basis that it is insolvent and is not paying its debts as and when they fall due.

b. What action can JoBo take to protect its interests?

Jobo can issue a demand to VP for the payment of the arbitration award that has been granted.

Commented [BT8]: 1.5

In the event a the statutory demand is not repaid, JoBo can present a winding up petition against VP on that basis of the Company not being able to pay its debts.

c. What action can the unpaid employees take against VP?

- **Unpaid employees can issue a demand for payment to VP for their unpaid dues.**
- **If the dues are not paid, the employees, on the basis of their standing as unsecured creditors, can present a petition for the winding up of the Company.**

Commented [BT9]: 1/2. They are preferred creditors.

d. Does the Cayman Islands Court have jurisdiction over VP?

- **The Cayman Islands court has jurisdiction over companies which are:**
 - o **Incorporated in the Cayman Islands**
 - o **Incorporated elsewhere but subsequently registered in the Cayman Islands**
 - o **Over foreign companies which:**
 - **Have property located in the islands**
 - **Are carrying on business in the islands**
 - **Is the general partner of limited partnership**
 - **Are registered under Part IX ("overseas company")**
- **As such, since VP is registered in the Cayman Islands, the Court has jurisdiction over VP.**

Commented [BT10]: 1

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

Restructuring

- **Historically, in order to restructure, an entity would have filed an application to be placed into provisional liquidation. In light of recent developments in the restructuring law, a company can now seek the appointment of a restructuring officer, CRO. VP can present a petition for the appointment of an RO on the basis that:**
 - o **It is likely to be unable to pay its debts**
 - o **It intends to present a compromise or arrangement to creditors**
- **The petition can be presented by the directors of the company without a resolution of the shareholder.**

- **The appointment of a restructuring office would provide a moratorium which would mean that no suits, in the Cayman Islands or elsewhere may be commenced or proceeded without leave of the court.**
- **However, secured creditors such as BITB would still be entitled to enforce on their security without leave of the court and without reference to the RO.**

Scheme of arrangement

- **The Company could seek to enter into a court approved compromise or arrangement with its creditors. This may be proposed and agreed between the company and its creditors or any class of creditors or between the company and its members/class of members.**
- **The scheme may be used to**
 - o **Restructure liabilities**
 - o **Reorganize share capital**
 - o **Alter shareholders and creditor's distribution rights**
- **A scheme may also be used to arrange a debt-to-equity swap. A pre-packaged sale of the company can also be considered in order to restructure.**

Commented [BT11]: 2.5

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

- **Each restructuring application is customized for the specific needs of the case and the powers granted to the court will greatly depend on the reason for the appointment of a provisional liquidator on a light touch basis or a restructuring officer. If it is deemed that there has been mismanagement for example, then the Rackham family may not be allowed to continue playing a part in running VP. The Rackman family may be allowed to continue playing a part in the restructuring depending on the powers granted by the Court. The powers will be based on the application that is filed in the court.**

Commented [BT12]: 1

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

The court will need to confirm whether the compromise or arrangement has the necessary creditor support before sanctioning the compromise or arrangement and making it binding on all the creditors, or the class of creditors.

Before approving a proposed restructuring, the court will need to be satisfied with;

- **Compliance with the convening orders**
- **Whether the majority of the creditors are a fair representation of the class**
- **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 the proposed scheme.]**

Commented [BT13]: 2

Commented [BT14]: 10.5

* End of Assessment *

Commented [BT15]: TOTAL MARKS 41/50