



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?

A creditor that has security over (parts of) the company's assets is entitled to enforce its security without the leave of the Court and without reference to the liquidator. Also, there is no stay on enforcement by secured creditors like in other jurisdictions.

For creditors, it is possible to register its security over certain assets in the Islands. Registration means that a third-party (purchaser) of the charged assets will be deemed to have notice of any such security interest and will therefore acquire the asset subject to the secured creditor's interest. Registration thereby gives priority, including in relation to non-registered creditors.

For example, the Register of Lands must be updated when creating a legal mortgage. Registration thereby puts third parties on notice and ensures that the mortgagee has priority over them. Mortgages can furthermore be used as security over ships and aircrafts. Such mortgages need to be registered on the respective vessel or aircraft register. Also, mortgages over shares shall be entered in the register of members by stating the secured creditor's name.

The Islands does thereby not have ownership registers for real estates, ships, aircraft, motor vehicles and IP (which can also be registered), but these registers are centrally maintained.

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 GC can provide ancillary relief, including 1) recognising the right of a foreign representative to act in the Islands on behalf of, or in the name of, a debtor, 2) enjoining the commencement or staying the continuation of legal proceedings against a debtor, 3) staying the enforcement of any judgment against a debtor, 4) requiring a person in possession of information relation to the business or affairs of a debtor to be examined by and to produce documents to its foreign representative; and 5) ordering the hand-over to a foreign representative of any property belonging to a debtor. The source of such power are sections 240 et seq. of the Companies Act. In determining whether such assistance is granted, the GC must act in the best interest of assuring an economic and expeditious administration of the debtor's estate, consistent with, inter alia, 1) the just treatment of all holders of claims, wherever they are domiciled, 2) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in foreign proceedings; 3) the prevention of preferential or fraudulent dispositions of property in the debtor's estate etc.

Question 2.3 [maximum 3 marks]

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

The GC has adopted a co-operative approach to ensure an effective winding up and the protection of the creditors' interests. However, the Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments (including the the Hague Convention).

Commented [BT2]: Ok answer but not always directed to answering the question. Question calls for information at guidance text 5.3. 2 marks.

Commented [BT3]: 3.5 marks

The Islands does provide for a statutory scheme for recognition and enforcement of foreign judgements stipulated in the Foreign Judgments Reciprocal Enforcement Act (FJREA). The recognition and enforcement of foreign judgments is, however, subject to the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgements.

This said, to be enforceable pursuant to the FJREA, the foreign judgment must be 1) final, 2) a money judgement and 3) made after the 1996 Act was extended to the relevant foreign country.

Given the limited application of the FJREA, the enforcement of foreign judgements is – in practice – usually achieved by commencing a new action in the Islands based on the foreign judgement.

Commented [BT4]: Good but more detail on the common law please. 2 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.

Despite the absence of a statutory prohibition on insolvent trading, directors can be made personally liable to the company for any losses which they cause the company if they act in breach of their fiduciary duty to act in the best interests of the company. In that context, in *Prospect Properties v Mc Neill*, the GC clarified that the directors' duty to act in the best interests of the company requires them to have regard to the interests of its creditors (ie their interest to be paid, which reflects the interest of the company to be safeguard against being put in a position where it is unable to pay).

When the company is in official liquidation, the official liquidator can pursue claims against the directors in the company's name for breach of their fiduciary duty.

Furthermore, there is a set of avoidance (claw back) rules, which may be applicable:

Section 99 of the Companies Act provides 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.

Furthermore, section 145 of the Companies Act provides that any payment or disposal of property to a creditor constitutes a voidable preference if the conditions as set forth in the *leg cit* are met.

Also, transactions in which property is disposed at an undervalue and with the intention to wilfully defeating an obligation owed to a creditor (ie intention to defraud) are voidable on application of the liquidator (the so-called avoidance of dispositions made at an undervalue pursuant to section 146 of the Companies Act).

Lastly, if the business of a company was carried on with the intent to defraud creditors or for any fraudulent purpose (fraudulent trading pursuant to section 147 of the Companies Act), a liquidator may apply for an order requiring any person, including directors, who were knowingly parties to such conduct to make such contributions to the company's assets as the Court considers adequate.

Commented [BT5]: 9/9

Question 3.2 [maximum 6 marks]

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

In the Companies Act and the Companies Winding up Rules, which specifically deal with insolvency, receivers are, in principle (ie, with the exception of Segregated Portfolio Companies), not mentioned. Therefore, one could *a prima vista* conclude that they have no role in a Cayman Island insolvency scenario. In practice, however, receivers may be appointed by the GC as contemplated by the Grand Court Rules (cf. Order 30 of the GCR which governs the appointment of receivers, order 45 of the GCR which provides for guidance regarding the enforcement of judgements and orders generally, and order 51 of the GCR on the appointment of receivers by way of equitable execution).

The purpose of the appointment of a receiver is to collect money such as rents or to carry out some other act, for example the execution of a contract. From a creditors' perspective, receivers can further offer an alternative course of action. This includes that a receiver may be appointed without court intervention pursuant to rights in a security instrument (ie a fixed or floating charge). In such cases, the receiver usually owes its duties to the creditors not being supervised by the court.

Commented [BT6]: Good. Specific reference to sections of statute and case law required for full marks. 4/6

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

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

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

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

This year, the tourism market picked up again; however, VP cannot afford to pay the ongoing costs associated with maintaining its fleet of ships (which include electricity and water costs for its huge dry dock facility, ongoing engineering and mechanical costs and also wages, pension and health insurance for its reduced team of employees)

let alone find enough money to buy the vast quantities of rum it needs to keep the tourist customers suitably refreshed.

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

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

(a) What action can BITB take to protect its interests?

Firstly, BITB should ensure that its mortgages over four of the party boats are registered on the respective vessel, in order to establish priority. Next, BITB may wish to consider whether (i) VP owns any other vessels or moveable / immovable property and, if yes, (ii) whether security can in good faith be established and, importantly, registered over such assets.

Provided that the security has validly been established, BITB may enforce its security rights in the vessels and/or other assets without the leave of the GC.

Furthermore, if the underlying security documents provide for the same (or can be amended to provide for the same), BITB may consider the appointment of a receiver, in order to realise the value of the charged assets / vessels and repay the creditor the amount of its unpaid debt (ie the outstanding facility plus interest and expenses).

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

The UK has extended its ratification of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Therefore, JoBo may file for the recognition and the enforcement of the award in the Islands.

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

Unpaid employees qualify as unsecured creditors. Unsecured creditors have the right to file a winding-up petition in respect of VP.

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

Yes, as VP is registered in the Cayman Islands.

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

Yes, in August 2022 the Cayman Islands introduced a new legislation creating the concept of the restructuring officer, which is akin to the USA's Chapter 11 proceeding. Under the scheme, VP may present a petition to the GC for the appointment of a RO on the grounds that it is or is likely to become unable to pay its debts and that it intends to present a compromise or arrangement to its creditors.

Commented [BT7]: 2

Commented [BT8]: 1.5

Commented [BT9]: And they are preferential. 1 mark.

Commented [BT10]: 1

Commented [BT11]: 1.5

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

Assuming that the company remains out of liquidation: As the regime is novel, it remains to be seen whether and to what extent, existing management, in the underlying case the Rackham family, will continue to have a role in managing the company after an RP has been appointed. Each case will thereby be fact **specific**.

Commented [BT12]: 1

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

The court will consider whether the scheme complies with the convening orders, whether the majority fairly represented the class and 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 approve it (acting **reasonably**).

Commented [BT13]: 2

Commented [BT14]: 10/15

* End of **Assessment** *

Commented [BT15]: 40.5/50 TOTAL MARKS