



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 with security over an asset of a company can enforce security despite the fact that a restructuring officer, provisional liquidator or official liquidator may have been appointed. A creditor can register mortgages and charges for real estate, ships, aircraft, motor vehicles and intellectual property -this creates priority once registered. The security interest is required to be entered into the register of mortgages and charges of the debtor company and is maintained by the company at its Cayman Islands registered office. This is outlaid under Section 54 of the Companies Act.]*

*In the Cayman Islands, there are no other assets that have a public security registration regime. Registering security interest in the company's register of mortgages and charges doesn't create priority. The third parties are put on notice as the register is open for inspection by any member of the company/creditor. A creditor with security over an asset of a company is entitled to enforce its security before or after a company is placed into liquidation. This can be done without leave of the liquidator - sec 142 Companies Act.]*

Commented [BT2]: 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 has not implemented the UNCITRAL Model Law on Cross-Border Insolvency, although most of the principles are followed (in the interests of comity). Under section 241 of the Grand Court can provide the following forms of ancillary relief*

- (a) recognising the right of a foreign representative to act in the Cayman Islands on behalf of, or in the name of a debtor*
- (b) enjoying the commencement or staying the continuation of legal proceedings against a debtor*
- (c) Staying the enforcement of any judgment against a debtor*
- (d) 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 representative*
- (e) Ordering the hand-over to a foreign representative of any property belonging to a debtor.*
- (f) The non-enforcement of foreign taxes, fines and penalties*
- (g) Comity (mutual recognition and co-operation concerning legal decisions).]*

Commented [BT3]: Almost. Question calls for criteria at section 242. 1.5 marks.

Question 2.3 [maximum 3 marks]

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



*[In cross border cases, the Grand Court adopts a co-operative approach to ensure an effective winding-up and the protection of the interests of its creditors, wherever those creditors are situated. The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments, neither has the UK extended its ratification of any such treaties to the Cayman Islands by Order in Council. Under the statutory scheme, the Foreign Judgments Reciprocal Enforcement has a limited application, and the enforcement of foreign judgments is usually achieved by commencing a new action based upon the foreign judgment as an unsatisfied debt or other judgment under The Grand Court Rules.*

**At common law there are 5 requirements:**

- *The judgment is final*
- *Foreign court has jurisdiction over the debtor*
- *The foreign judgment was not obtained by fraud*
- *The foreign judgment is not contrary to public policy of the Cayman Islands*
- *Foreign judgment was not obtained contrary to the rules of natural justice*

Commented [BT4]: More detail 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.***

*[Directors can be made personally liable to the company for losses which they caused whilst acting in breach of their fiduciary duty, which is to act in the best interests of the company. The Companies Act however does not contain specifically a prohibition on insolvent trading. Section 147 of the Companies Act details that if insolvent trading was continued with the intent to defraud creditors or indeed for other fraudulent means a liquidator can apply for an order requiring any knowing parties to conduct to make contributions to the company’s assets as the Court sees fit. An example of this can be seen in the Grand Court that was held in the case of Prospect Properties v McNeill, where a company was insolvent, and the directors’ duty to act in the best interests of the company required them to have the interests of its creditors at the fore. For breaches of the directors’ fiduciary duties, the official liquidator could pursue claims against the directors on behalf of the company.*

*The liquidator may apply to the Grand Court to order the creditor to return assets and prove in the liquidation for the amount of its claim if a disposition is considered to be a voidable preference. This is covered under section 145 of the Companies Act. For a disposition to be considered voidable, the disposition must have occurred in the last*

6 months before commencement of the liquidation, and at a time when it is unable to pay its debts, and the directors clear intention was to give a creditor preference over another. Importantly, a disposition made to a related party of the company will be deemed to have been made with a view to giving a preference. There are also avoidance of dispositions made at an undervalue which is provided for under **Section 147** of the Act, that a transaction in which property is disposed of at an undervalue and with the intention of wilfully defeating an obligation owed to a creditor is voidable on application of the liquidator.]

**Commented [BT5]:** This is 146. 147 is fraudulent trading, which is also relevant. 7/9.

Question 3.2 [maximum 6 marks]

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

[The Grand Court Rules (GCR) contemplate that receivers may be appointed by the Court for the purposes of collecting money or to carry out the execution of a contract or document title. Order 30 GCR governs the appointment and duties of receivers generally. Order 45 GCR states that receivers may be appointed to enforce court orders for the payment of money, and Order 51 GCR also provides for the appointment of receivers by way of equitable execution. On this basis alone I would tend to disagree with the statement 'Receivers have no role to play in a Cayman Islands insolvency scenario'. The purpose in my view of receivers is to provide an alternative course of action for certain creditors as they can be appointed without the court's involvement, and will act under the powers set out in the charge document. There are also niche situations that arise which the appointment of a receiver may be better suited than opting for a provisional or official liquidation.

Take for example the statute provided in respect of a particular type of Cayman Islands legal entity, namely the Segregated Portfolio Company (SPC). An SPC is basically a regular company which remains as a single entity, but is permitted to create separate portfolios for the allocation of different types of assets and liabilities contained in other portfolios. If 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 creditors in respect of that portfolio, it may make a receivership order in respect of that portfolio. The role is comparable to a liquidator here.

A receivership order must direct that the business and assets of a segregated portfolio are managed by a receiver specified in the order for the purposes of the orderly closing down of the business relating to the segregated portfolio and the distribution of the segregated portfolio assets. It is important to note the popularity of SPCs in the Cayman Islands, and the perks of structuring a company this way. Each segregated portfolio for bankruptcy purposes are treated as single legal entities despite the SPC itself technically being a single legal entity. In conclusion, it is my view that the existence of SPCs alone renders the receiver's role important in certain Cayman Islands insolvency scenarios.

**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) BITB (the "Bank"), is a substantial creditor of VP as they have given them a very large loan. In an effort to recover the outstanding monies/debt they could take legal action. A portion of the loan is secured by a mortgage over 4 of the Company's largest party boats, so BITB can initiate foreclosure proceedings on those boats to enforce its security interest. This could be done by liquidating the boats by selling them for cash, which would help BITB in recovering their debt. VP could also make an attempt to restructure their debt with BITB by increasing the time period for the loan or some other terms which might save the company from going into liquidation.

b) VP has no prospect of being able to satisfy that award of USD 50mn damages to JoBo. JoBo can enforce the award through the Cayman court and initiate legal proceedings to enforce the ICC ruling and seek a court order for the payment of \$50mn in damages. VP has no prospect of paying \$50mn upfront do they may have to sell and hand over assets to JoBo.

c) The employees unpaid can also pursue legal action against VP to recover unpaid wages, pension, health insurance etc. by filing a claim in the Cayman court seeking payment for their unpaid salaries. d) Of course the Cayman Islands court has jurisdiction here, the company is registered in the Cayman Islands.

e) A scheme of arrangement could enable VP to propose a restructuring plan to its creditors for approval, which will help them restructure their debt and potentially see a way back to trading again. Alternatively, VP could initiate a formal insolvency process through petition of a creditor or member. f) The family as the owners of VP could make their best efforts to cooperate with all the relevant parties that may pursue legal action against them for recovery of their debts, and they could also work with the directors to get the best outcome possible for the shareholders and the company. Their involvement however might be subject to approval from the court.

g) The court could take the following factors into account in advance of approving any proposed restructuring:

- The feasibility of the plan
- the chances of VP surviving
- are the creditors being treated fairly here
- are they being compliant with the relevant Cayman legislation or laws and regulations.]

\* End of Assessment \*

Commented [BT7]: 1.5

Commented [BT8]: 1.5

Commented [BT9]: 1. As preferential creditors.

Commented [BT10]: 1

Commented [BT11]: 1

Commented [BT12]: 1/2

Commented [BT13]: 1/2

Commented [BT14]: Bit vague on the detail here. Generally right answers but citation of the actual tests and laws necessary to win marks. 7 / 15

Commented [BT15]: 35 OUT OF 50