



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.

Commented [BT1]: Incorrect. Answer was (d)

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.

Commented [BT2]: Incorrect. Answer was (c)

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.

Commented [BT3]: Incorrect. Answer was (d)

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

Commented [BT4]: 7/10

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?

There is no central public registry for registering security in Cayman Islands except for Real Estate, Ships, Aircraft, Motor Vehicles and Intellectual Property. The mortgages and charges can be registered under the respective laws for these assets. With respect to registration of security on other assets, Section 54 of the Companies Act requires each company to enter the security interest in the register of mortgages and charges of the respective debtor company. The said register shall be maintained by the company at its registered address for the inspection of all the members of such company.

Commented [BT5]: Information lacking on priority and third party notice. See guidance text 5.3 - 1.5 marks

Question 2.2 [maximum 4 marks]

Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?

The Grand Court does have power to assist the foreign insolvency / bankruptcy proceedings and the same is derived from Part XVII of the Companies Act.

The Cayman Islands does not have a threshold test for grant of assistance. Therefore, the foreign representatives must satisfy the Grand Court that it is appropriate for the court to exercise its discretion by granting the relief sought in their application.

The Grand Court can pass the following ancillary orders:

- o Recognising the right of the foreign representative to act on behalf of the debtor;
- o Enjoining the commencement or staying the continuation of legal proceeding against the debtor.
- o Staying the enforcement of any judgement against the debtor;
- o Requiring a person in possession of information relating to the business affairs of the debtor to be examined by and to produce document to the foreign representatives; and
- o Ordering hand over of property belonging to the debtor to foreign representative.

In order to determine the above mentioned ancillary orders to be passed, the Grand Court looks into the following factors:

- o Just treatment of all holders of claims.
- o Protection of claim holders in Cayman Islands
- o Prevention of preferential or fraudulent disposition of property
- o Distribution of the estate in accordance with the statutory order of priority
- o Recognition and enforcement of security interest created by the debtor
- o Non- enforcement of foreign taxes, fines and penalties
- o Comity.

Commented [BT6]: Yes, to 'best assure an economic and expeditious administration ... etc' per section 242 - 3 marks

Question 2.3 [maximum 3 marks]

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

The Foreign Judgements Reciprocal Act in Cayman Islands provides a scheme for recognition and enforcement of foreign judgement with respect to the country wherein the judgment originates have reciprocal scheme or arrangement in respect of the enforcement of Cayman Island Judgements. However, only judgements of Superior Courts of Australia have been recognised until now. The procedure for the same is enshrined under Order 71 of the Grand Court Rules. According to the rules, In order to enforce the foreign judgements, the judgment must be final, a money judgement and also made after the year 1996 (i.e., the effect of the revision of The Foreign Judgements Reciprocal Act).

Apart from the abovementioned statutory recognition, the recognition and enforcement of foreign judgements through the international treaties and conventions are not applicable to Cayman Islands, because of the reason that the Cayman Islands is not signatory to any such international treaties.

Since the application of Foreign Judgements Reciprocal Act is limited in nature, foreign judgements' enforcement in Cayman Islands usually requires initiation of a new action under the Cayman Islands domestic law and based on the relevant foreign judgement as an unsatisfied debt or other obligations. This recognition and enforcement is under Common Law, and thus it requires the test under the Common Law which are the following:

- a. Finality;
- b. Proper Jurisdiction;
- c. Judgement was not obtained by fraud;
- d. Judgement is not contrary to the public policy of Cayman Islands; and
- e. Judgement was not obtained contrary to the rules of natural justice.

Upon ruling of a local court, the said local judgement can be enforced accordingly which means that the foreign judgement indirectly gets enforced.

In terms of limitation, 6 years is calculated from the date of judgement.

Commented [BT7]: 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.

Under the Cayman Islands insolvency law, there is no prohibition on continuing to trade while the company is insolvent. However, the directors of such a company could personally be made liable for any losses as the same is a breach of their fiduciary duty to act in the best interest of the Company. In the matter of Prospect Properties v. McNeill (1990-91 CILR 171), the Grand Court held that it is the director's duty to act in the interest of the creditors and the company once the company is insolvent. Such breach of fiduciary duty by the director could raise claims against such directors and the official liquidator on behalf of the company could pursue such claims.

In terms of claw back mechanisms, any preferential, undervalued, or fraudulent transactions could be considered as void.

The Preferential transaction means a transaction where in the company's directors gave preference to any creditor over the other creditors. In order to qualify as a preferential transaction under Section 145 of the Companies Act, such a transaction should have happened 6 months prior to the commencement of the company's liquidation and at a time when the company was unable to pay its debts. Such a preferential treatment should be the dominant intention of the directors. However, if the company's dominant intention is preferential treatment was to achieve a purpose other than undue advantage, such a transaction may be not categorised as voidable transaction. Moreover, preferential treatment to related party of the company will be deemed to be made with the dominant intention to give undue advantage. The Grand Court upon the application of the liquidator may set aside, the preferential transaction accordingly.

Section 146 of the Companies Act deals with the undervalued transaction (i.e., disposal of an asset at an undervalued price), if made with the intention of wilfully defeating an obligation owed to a creditor, could be set aside by the Grand Court upon application from the liquidator. The application to set aside an undervalued transaction could be brought in by the liquidator within 6 years from the disposal of such assets.

Fraudulent Trading as dealt under Section 147 of the Companies Act, reverses the fraudulent transactions which were carried on with the intent to defraud creditors. An application can be filed by the liquidator against any persons who were knowingly involved in such fraudulent transaction. The Grand Court can also direct such persons to make certain contributions to the company's assets.

Commented [BT8]: 9/9

Question 3.2 [maximum 6 marks]

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

Receivers act akin to a liquidator pursuant to receivership against a portfolio order in respect of a Segregated Portfolio Company. The Grand Court passes a receivership order, if it is satisfied that the SPC's assets attributable to a particular portfolio of the company are likely to be insufficient to discharge or service the claims of the creditors of that portfolio. The duty of the receiver in respect of such a proceeding involve management of the business of the portfolio, orderly closing down of the portfolio, and distribution of assets of the segregated portfolio to the creditors / claimants.

Once an application for receivership order has been made, no suit, action or other proceedings may be instituted against the SPC in respect of the segregated portfolio except by the leave of the court. Powers of the directors in managing the business of the segregated portfolio shall be suspended once the receiver take charge of the segregated portfolio.

In light of the above, it is evident that the receivers have a role in the Cayman Islands insolvency regime.

However, it is to be note that liquidation proceeding is paramount to the receivership proceeding. This is because, a Receivership order shall cease to be of effect upon commencement of the winding up process of the SPC. However, winding up proceeding will be without prejudice to the prior acts of the receiver.

Apart from SPCs, even in case of normal companies, the appointment of receiver may be an alternative route of recovery for creditors. If there is a security instrument which provides for appointment of receiver at the instance of the creditors, such creditors may appoint receivers without any involvement of any court. Moreover, the powers even though shall be set out in

the security instrument of any other agreement, the allegiance of the receiver shall always be towards the creditors rather than the debtor company. Similar to liquidator the receiver shall realise the value of assets and distribute the same to the creditors accordingly. The said act of appointment of a receiver by a secured creditor to enforce security rights is even permissible after the passing of the provisional order under the Bankruptcy Act.

General provisions in terms of appointment of a receiver is enshrined under Order 30, 45. And 53 of the Grand Court [Rules](#).

Commented [BT9]: 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) Liquidation
Receivership
Restructuring Officer
Information Restructuring

Commented [BT10]: 1/2. This is a question about the rights of secured creditors

- (b) Enforce the award through local proceeding
Liquidation
Restructuring Officer

Commented [BT11]: This is a question about recognition and enforcement of arbitral awards

- (c) Liquidation

Commented [BT12]: This is a question about preferential creditors and standing to wind up

- (d) Since VP is registered under the Cayman Islands, the courts of Cayman Island have jurisdiction over VP as per Section 91 of the Companies Act.

Commented [BT13]: 1.5

- (e)

Informal Restructuring:

CP can enter into an informal arrangement, compromise or restructuring with the BITB and other creditor and sign an agreement to that effect which takes care of all the stakeholders of VP.

Provisional Liquidation (PL):

Provisional Liquidation is used by the companies to get a breathing space by way of moratorium and then enter into a compromise, arrangement or restructuring with the creditors. The powers of the directors to management VP may be retained under PL subject to the order of the Court. However, such powers of the directors and control exercised by the directors will be under the supervision of the provisional liquidator and the Grand Court. It is important to note that certain essential supply of goods and services are continued during PL.

Restructuring Officer (RO):

Part V, Section 91A-J of the Companies Act has brought in a feature of corporate rescue via a scheme of arrangement. The Application for restructuring under these provisions will trigger moratorium and protect VP from multiplicity of recovery actions. However, BITB being a secured creditor can still enforce its security rights to the extent of the debt which are secured.

Commented [BT14]: 2.5

- (f) The Rackham Family could continue to be part of the management of the VP during both PL and RO procedure. However, if the Grand Court is satisfied that there is an instance of mismanagement in VP, the Grand Court, may in the PL order or RO order restrict the access of the Rackham Family in managing the VP. Basically, to what extent the Rackham Family could have control over the VP, is decided by the Grand Court, on a case to case basis.

Commented [BT15]: 1

- (g) While approving a Restructuring Scheme, the Court of Cayman Island shall consider the following factors:

- Compliance with the convening order;
- Whether the majority fairly represent the class of the creditors; and
- Whether the arrangement is such that an intelligent honest members of the class of creditors convened, acting in their own interest, might reasonably approve it.

Commented [BT16]: 2

Commented [BT17]: 7.5

* End of Assessment *

Commented [BT18]: 36/50 TOTAL MARKS