



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

CAYMAN ISLANDS

***This is the*** summative (formal) assessment ***for*** Module 5C ***of this course and must be submitted by all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 5C. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment5C]. An example would be something along the following lines: 202223-336.assessment5C. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 9 pages.**



**ANSWER ALL THE QUESTIONS**

QUESTION 1 (multiple-choice questions) [10 marks in total]

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

Select the correct answer.

Once an application for a restructuring officer is filed:

- (a) No action may be commenced against the company without leave of the court.**
- (b) No existing action may be continued against the company without permission of the provisional liquidator.**
- (c) Legal proceedings may be commenced or continued against the company without leave of the court.**
- (d) No action may be commenced against the company.**

Question 1.2

Which of the following is not available to a debtor company in the Cayman Islands?

- (a) Appointment of a receiver.**
- (b) Court-supervised liquidation.**
- (c) Official liquidation.**
- (d) Deed of Company Arrangement.**

Question 1.3

Select the correct answer.

In a voluntary liquidation:

**(a) The company may cease trading where it is necessary and beneficial to the liquidation.**

**(b) The company must cease trading except where it is necessary and beneficial to the liquidation.**

**(c) The company must cease trading if it is necessary and beneficial to the liquidation.**

**(d) The company may cease trading unless it is necessary and beneficial to the liquidation.**

Question 1.4

Select the correct answer.

**The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:**

**(a) A company incorporated in the Cayman Islands.**

**(b) A company with property located in the Cayman Islands.**

**(c) A company carrying on business in the Cayman Islands.**

**(d) Any of the above.**

Question 1.5

Select the correct answer.

**In a provisional liquidation, the existing management:**

**(a) Continues to be in control of the company.**

**(b) Continues to be in control of the company subject to supervision by the court and the provisional liquidator.**

**(c) May continue to be in control of the company subject to supervision by the provisional liquidator and the court.**

**(d) Is not permitted to remain in control of the company.**

Question 1.6

Select the correct answer.

*When a winding up order has been made, a secured creditor:*

- (a) May enforce their security with leave of the court.*
- (b) May enforce their security with leave of the court provided the liquidator is on notice of the application.*
- (c) May enforce their security without leave of the court.***
- (d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.*

Question 1.7

Select the correct answer.

*Any payment or disposal of property to a creditor constitutes a voidable preference if:*

- (a) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.*
- (b) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.***
- (c) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.*
- (d) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.*

Question 1.8

*Which of the following is not a preferential debt ranking equally with the other four?*

- (a) Sums due to company employees.*

**(b) Taxes due to the Cayman Islands government.**

**(c) Amounts due to preferred shareholders.**

**(d) Sums due to depositors (if the company is a bank).**

**(e) Unsecured debts which are not subject to subordination agreements.**

Question 1.9

Select the incorrect statement.

A company may be wound up by the Grand Court if:

**(a) The company passes a special resolution requiring it to be wound up.**

**(b) The company does not commence business within a year of incorporation.**

**(c) The company is unable to pay its debts.**

**(d) The board of directors decides it is "just and equitable" for the company to be wound up.**

**(e) The company is carrying on regulated business in the Cayman Islands without a license.**

Question 1.10

Select the correct answer.

In order for a proposed creditor scheme of arrangement to be approved:

**(a) 50% or more representing 75% or more in value of the creditors must agree.**

**(b) 50% or more representing more than 75% of the creditors must agree.**

**(c) More than 50% representing more than 75% of the creditors must agree.**

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

Commented [BT2]: 9/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

**Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?**

*In the Cayman Islands, it is in fact possible for a creditor to register its security over an asset of a company. While Cayman does not have an official insolvency regulator like many other countries, the Cayman Islands Monetary Authority ("CIMA") act as an organization that can appoint Controllers over any entity that appears to be in breach of its regulatory requirements.*

*Upon appointment of a restructuring officer or liquidator, there is no Moratorium, therefore, a creditor that holds security over either a whole or part of the relevant company has the ability to enforce the security without the leave of the Court and without assistance from the liquidator. There are several common securities that can be registered:*

- Legal mortgage
- Equitable mortgage
- Fixed charge
- Floating charge
- Pledge
- Lien

*Due to the fact that the Cayman Islands does not have a public regime dictating registration of securities, it is the creditors responsibility to determine whether the asset that is trying to be registered is already claimed. This information can be found in the company's register of mortgages and charges as under section 53 of the Companies Act requires companies to maintain accurate record keeping with regard to registered security.*

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?**

*As per the Foreign Bankruptcy Proceedings (International Cooperation) Rules of 2018 (the "FBPR 2018"), the Grand Court is permitted to have the power to assist foreign bankruptcy proceedings in accordance with section 241 of the Companies Act. While the Cayman Islands is not a part of any cross-border treaties regarding reciprocal recognition, it does take a cooperative approach to cases of foreign insolvency proceedings. The FBPR 2018 ultimately maintains the legal parameters by which a foreign representative of any form of foreign insolvency proceeding can be recognised in the Cayman Islands and pursue assistance from the Grand Court.*

*The Grand Court can recognize the right of a foreign representative to act for the debtor in the Cayman Islands and the Court can enforce a Moratorium to allow the*

**Commented [BT3]:** Question is really calling for information at 5.3 guidance text which this final paragraph starts to explore. 1 mark.



*restructuring office or liquidator a stay on proceedings. Consequently, in the Cayman Islands a foreign representative in a foreign bankruptcy proceeding can investigate and request information related to the debtor while also having the ability to order the to hand over any property of the debtor.*

*Prior to providing assistance to any foreign bankruptcy proceeding, the Grand Court has to determine whether the treatment will remain just and equitable for all claim holders in the proceedings, the distribution of the debtor's estate will be in accordance with the statutory priority of creditors, and the Grand Court has to be considerate of the foreign recognition cooperation between jurisdictions.*

**Commented [BT4]:** Reference to section 242 and 'best assure an economic and expeditious administration of the debtor's estate' required. - 2.5 marks.

Question 2.3 [maximum 3 marks]

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

*Unlike the US Bankruptcy framework that the Cayman Islands often has cross-border interactions with, the Grand Court in the Cayman Islands can be considered to be creditor-friendly and takes a co-operate approach to winding-up of companies regardless of where pertinent creditors are located.*

*The Foreign Judgement Reciprocal Enforcement Act (1996 Revision) (the "1966 Act") maintains a framework from which recognition and enforcement of foreign judgements can be considered subject to the foreign jurisdictions confirmation that the originating judgement will have mutual reciprocity of treatment of the Cayman Islands judgement. Thus far, the 1966 Act has only been applicable to judgement from the Supreme Courts of Australia.*

*Conscious of the 1966 Act's limitations, under the Grand Court Rules, foreign judgements are enforced if a new legal action is taken in the Cayman Islands. In order for a foreign judgement to be official enforced it must require:*

- *The judgement to be final;*
- *The foreign court to have jurisdiction over the debtor and not be fraudulent; and*
- *The foreign judgement to align with the Cayman Islands public policy.*

*Under the 1966 Act, the judgement period also has a limitation of six-years from the date of the judgement.*

**Commented [BT5]:** 3 marks

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 9 marks]

**In the absence of a statutory prohibition on insolvent trading, is it possible for court appointed liquidators of an insolvent company, or creditors of such a company, to hold**

**its former directors accountable by either seeking financial damages against those directors and / or by seeking to “claw back” any payments that those directors should not have made? If so, please explain the possible options.**

*There is no statutory prohibition in the Cayman Islands on creditor claims trading and no statutory obligation for a director of an insolvent company to file for insolvency under the Companies Act until 2021. As a result, the Companies Act doesn't contain guidance for legal actions to take with regard to directors wrongful trading. There have been amendments made to the Companies Act (Amendment 2021) which gives directors statutory authority to apply for a winding up without the previously required approval from shareholders.*

*On the other hand, the Companies Act does account for directors' breach of fiduciary duty to the company and permits them to be held personally liable. A court appointed liquidator has the powers throughout an official liquidation to pursue directors on behalf the company and creditor if their conduct is deemed unsuitable and actions prior to winding up in question. As per section 99 of the Companies Act, the liquidator has the ability to require repayment of transactions made by directors after the commencement of the winding up petition that would be considered a breach of fiduciary duty or rather misfeasance, unless such transaction is validated by the Grand Court.*

*In a scenario where an insolvent company does not have a pending winding up petition, there are alternative methods to claw back any payment that a director should not have made. These methods include voidable preferences and fraudulent trading. Under section 145 of the Companies Act, if any transaction made within 6 months prior to the commencement of an insolvent company's liquidation or rather if a company's director makes the transaction to give preference for a creditor or class of creditor, the court appointed liquidator can ask Grand Court to require the creditor to return the asset.*

*As per section 147 of the Companies Act, if a transaction is carried out by the director or the director is trading whilst insolvent with the intention to defrauding the company's creditors, a court appointed liquidator can apply to the Grand Court. The order can be made to request that the director or any other officeholder involved in such transactions be made to make contributions to the company's estate as the Court sees fit.*

Commented [BT6]: Also section 146. 8/9 marks.

Question 3.2 [maximum 6 marks]

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

*Receivers play a distinct role in a complex part of the Cayman Islands insolvency framework. Receiverships are not mentioned in the Companies Act or Companies Winding up rules, however, the Grand Court Rules (the “GCR”) dictates the Court appointment of a receiver over a company. Order 30, order 45, and order 51 of the*

*GCR accounts for the duties that a receiver holds and receiver appointment stipulations including appointment for the collection of money i.e., rent and appointment where the Court ultimately sees fit to do so.*

*A receivership is initiated in the Cayman Islands primarily over insolvent companies to give an alternative option to a restructuring and provisional or official liquidation. In contrast with other methods of insolvency proceedings, receivers can be appointed by fixed or floating charge holders out of court if a company does not repay its obligations. An out of court receivership is inclined to favour the needs of the creditors rather than the debtor.*

*Segregated Portfolio Companies ("SPCs") in the Cayman Islands are Cayman registered entities that are singular legal entities which establish segregated portfolios that hold separate assets and liabilities. All segregated portfolio's must be kept legally separate from each other. There are several comparable structures in different island jurisdictions, namely in Bermuda with their Segregated Accounts Companies. In theory a SPC is a simple corporate structure to maintain, however, it can present complexities in the regular course of business which can lead to the placement into receivership and appointment of a receiver.*

*The receiver is appointed over one or more of the segregated portfolio's which are deemed to have insufficient funds to pay of its liabilities, under section 224(1) of the Companies Act. A receiver is given the right to close down a segregated portfolio and distribute any remaining assets to the pertinent creditors. The role of a receiver of an SPC is similar to that of a liquidator, yet the receivers' powers do not extend as broadly over the company. Once a receiver is appointed, directors are relieved of their duties and a stay is put in place preventing any legal action against the pertinent segregated portfolio unless determined otherwise by the Grand Court. A receivership order cannot move forward if the SPC is already in the process of being wound up or in turn it must come to an end if winding up proceedings commence.*

Commented [BT7]: 6/6

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

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

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

***VP has only managed to stay afloat for the past three years with the assistance of a very large loan from Blue Iguana Treasure Bank (BITB). BITB has lent VP USD 300 million (USD 180 million of which is secured by a mortgage over four of VP's largest party***

**boats). The loan facility has now been exhausted. VP has also fallen behind on the monthly repayments to BITB.**

**This year, the tourism market picked up again; however, VP cannot afford to pay the ongoing costs associated with maintaining its fleet of ships (which include electricity and water costs for its huge dry dock facility, ongoing engineering and mechanical costs and also wages, pension and health insurance for its reduced team of employees) let alone find enough money to buy the vast quantities of rum it needs to keep the tourist customers suitably refreshed.**

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

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

- (a) What action can BITB take to protect its interests?**
- (b) What action can JoBo take to protect its interests?**
- (c) What action can the unpaid employees take against VP?**
- (d) Does the Cayman Islands Court have jurisdiction over VP?**
- (e) Is there a legal route via which VP can protect itself and seek to restructure?**
- (f) Following on from (e) above, can the Rackham family continue play a part in running VP during any restructuring process?**
- (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?**

**Blue Iguana Treasure Bank has a loan of USD \$120 million and mortgage of USD 180 million. The mortgage that Vegan Patty Inc. secured over four of its party boats is considered an equitable mortgage. Generally, this type of mortgage does not allow for the mortgagee to take possession of the collateral unless the mortgage agreement between VP and BITB contained a power of attorney enabling BITB to transfer the boats under their name if defaulted.**

**In addition, mortgaged over ships are required to be registered with vessel registers, indicating that BITB would be names as a holder of shares on the register of members. Given the extent of VP's inability to pay its debts and insolvency, BITB can petition the**

Grand Court to put the Company into liquidation and appoint a liquidator. BITB will have priority over a number of creditors as it is a preferential creditor.

Commented [BT8]: 1.5

Considering the urgency and large number of damages owed to Johnson & Boris Ltd, JoBo can request a Restructuring Officer to be appointed on an interim basis over VP in accordance with section 104(3) of the Companies Act with the VP's consent. Given that JoBo will likely want to maximize its distribution of defaulted debts, an agreement with minimal court involvement compared to liquidation in the form of a scheme of arrangement may benefit the secured creditor. There are more options with regard to recover of funds for VP including restructuring of liabilities, altering creditor's distribution rights or debts for equity swaps.

Commented [BT9]: 1 mark. This is about recognition and enforceability of arbitral awards

The employees of Vegan Patty Inc. will fall under the preferential creditors class if they petition to put the Company into a provisional liquidation. The Grant Court would surely approve the winding up petition upon receiving the statement of affairs and understanding that VP is no longer a going concern. In order to preserve the remaining assets of the Company, placing it into liquidation would initiate a Moratorium to protect the Company and thereafter provide the employee with some consolation knowing that per section 141 of the Companies Act, the sums due to the employee are to be paid in priority to all other debts except for the liquidator's remuneration. If needed, the liquidation can be converted to an official liquidation with approval from the Grant Court.

Commented [BT10]: 1.5

It is not specified whether Vegan Patty Inc. is registered and incorporated in the Cayman Islands. However, whether VP is incorporated in of the Cayman Islands or elsewhere it doesn't matter because according to section 91 of the Companies Act its registration in the Cayman Islands gives the Grand Court jurisdiction over the Company.

Commented [BT11]: 1.5

As mentioned above, Vegan Patty Inc. can enter into a scheme of arrangement which could, if desired and beneficial to the Company, allow the existing officeholder to continue to manage the Company alongside the Restructuring Officer. This decision is ultimately up to the discretion of the Grand Court. Consider the longstanding involvement of the Rackham family, one would assume that they would be involved in the management of VP but also possibly hold shares in the Company or be creditors themselves. Therefore, there is a high possibility that the Rackham family would continue to play a role in the restructuring.

Commented [BT12]: Question is looking for reference to CRO and PL with moratorium 1 mark.

Commented [BT13]: 1/2

Commented [BT14]: (g)?

Commented [BT15]: 7/15

Commented [BT16R15]: 36.5/50 TOTAL MARKS

\* End of Assessment \*