



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.**

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

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.

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

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 [BT3]: 8/10

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?

Secured creditors are entitled to enforce its security even though an insolvency practitioner may have been appointed. They may enforce without the leave of the Grand Court and without any reference to the company's restructuring officer or liquidator.

If a secured creditor has debt that is more than the value of their security, they may prove it in a liquidation for the unsecured balance. The proof of debt submitted by the secured creditor must state particulars of the security and the value which they place on the security.

Commented [BT4]: This question called for information at 5.3 guidance text. 0 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 considers UNCITRAL Model Law, but it hasn't been implemented. Although having no formal cross border framework the Grand Court use the guidance of section 242 of the Companies Act

Commented [BT5]: More on this was needed. 1.5 marks.

The Grand Court does have the power to assist in foreign bankruptcy proceedings and the ability to make orders:

- incorporated in the Cayman Islands;
- incorporated elsewhere but registered in the Cayman Islands; and
- if the foreign company has property and or carrying on business in the Islands, is the general partner of a limited partnership or is registered under Part IX.

The Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 provides guidelines for foreign representatives to be recognised in the Cayman Islands and to seek assistance from the Grand Court

Question 2.3 [maximum 3 marks]

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

The Foreign Judgments Reciprocal Enforcement Act provides a statutory scheme for recognition and enforcement of foreign judgments. This is only if the country where the judgment is assured reciprocity of treatment regarding enforcement of Cayman Islands Judgements. The provisions of the Act have only been extended to judgments from the Superior Courts of Australia.

It is governed by Order 71 of the Grand Court Rules. For the judgment to be enforceable it must be:

- Final
- A money judgment; and
- Made after the 1996 Act was extended to the relevant foreign judgment.

Commented [BT6]: So what about other jurisdictions? Common law solution? 1.5 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.

A liquidator's powers allow them to compel directors and officers to submit oral examination if needed for an investigation.

There are several avenues which creditors or liquidators to go through to seek financial damages or to claw-back payments from directors. Sections 145-147 of the Cayman Companies Act provides guidance on how a liquidator or creditor can seek financial damages.

One avenue is that of voidable preference, according to Section 145 of the Companies Act any payment a payment or disposal of property to creditor is a voidable preference if, it occurs six months prior to the commencement of liquidation and when the company is unable to pay its debts; and the main intention of the directors was to give the creditor preference over the others. Dispositions that are made as a preference is voidable upon the application of the liquidator. They may go to the Court and ask for an order for the creditor to return the asset and submit a claim in the liquidation to prove the amount.

Another avenue is when a transaction is made at undervalue, in section 146 of the Companies Act says if property was disposed of at an undervalue and with the intention to wilfully defeat an obligation owed to a creditor (intent to defraud) it is voidable on application of the liquidator. It is up to the creditor or liquidator to establish and bring evidence of an intent to defraud. The liquidator and creditor must bring these claims within six years of the disposal.

Another avenue is through section 147 of the Companies Act if there is reason to believe that the company has been carried on with the intent to defraud creditors of the company or creditors of another person. The liquidator may apply to the Court for a declaration. The court may declare that anyone who knowingly carried out the fraud are liable to make contributions to the company's assets as the Court sees fit. The creditor or liquidator must bring proof to establish that a transaction at an undervalue occurred.

Directors can be made liable to the company for any losses that they may have caused the company if they act in breach of their fiduciary duty to act in the best interests of the company. The directors' duties include having the creditors best interests in mind. When a company is in liquidation the liquidator can pursue claims against the director for breach of fiduciary duty.

Commented [BT7]: Good. A bit more detail (e.g. case law) required for full marks. 8/9.

Question 3.2 [maximum 6 marks]

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

In Cayman receivers do have a role to play in insolvency scenarios but it is not as commonly used compared to other procedures like liquidations or restructurings.

When dealing with Segregated Portfolio Companies (SPCs) a receivership order can be made to appoint a receiver to wind down the segregated portfolio and to distribute those assets related to it.

A receivership may not be made if the SPC is in the process of being wound up and shall cease to be of effect if upon commencement of the winding-up of an SPC a receiver is currently acting.

The main relevance of receivers is that they may offer assistance for certain creditors. A receiver can be appointed without the need for a court. Depending on the charging document a holder of a fixed or floating charge holder can appoint a receiver over the company's charge assets if the debtor defaults on its obligations. The receiver acts under the powers set out in the charge document and will usually include a right of sale. The receiver will realise the value of the charged asset and repay the creditor the unpaid debts. The receiver is not supervised by the court and usually owes it duties to the creditor rather than the debtor.

Commented [BT8]: Good. Specific reference to sections of GCR, 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?**
- (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?**

BITB can seek to enforce the security of the mortgage which is held over the four boats. BITB can enforce its security notwithstanding the fact that an insolvency practitioner may be appointed. BITB may look to renegotiate the to improve VP's lending conditions. Since they are only just starting to recover from the pandemic better lending conditions could give them more time to improve their finances and continue as a going concern. BITB can also if needed seek an order from the court to take possession of the boats which they have security over.

Commented [BT9]: 2

JOBO can enforce the ICC judgement on VP to pay the damages of USD 50 million. They can also look to use the Foreign Judgments Reciprocal Enforcement Act to get their judgment that was awarded recognised. Order 71 of the Grand Court Rules governs this and in order for the judgment to be enforceable the judgement must be final, a money judgment and made after the 1996 act was extended.

Commented [BT10]: 2

Employees can pursue legal action against VP for the unpaid wages, pension, and health insurance that they haven't been receiving. As employees are preferential debts in the order of priorities, they will receive priority If the company enters into insolvency proceedings they will be classified under preferential debts in the order of priorities and paid before any other creditors that rank lower than them. They can also petition for the winding up of the company.

Commented [BT11]: 1

Since VP is registered in the Cayman Islands the Grand Court would have jurisdiction.

Commented [BT12]: 1

Originally prior to 31 August 2022 the VP could file an application to place the company into provisional liquidation to enter negotiate a better position with their creditors via a scheme of arrangement. Now amendments to the Companies Act allow for a restructuring officer to be appointed this will trigger an automatic stay which halts any action being taken against the company and gives the VP time to restructure. The provisional liquidation route is still

applicable however the appointment of a restructuring officer is seen to be the new way forward in **Cayman**.

Commented [BT13]: 2

It is however unknown if the Rackham family will be able to continue playing a part in the running of the company this will be up to the Grand Court to **decide**.

Commented [BT14]: 1/2

After petition is filed an application must be made to the Grand Court for an order that meetings of creditors must be held, scheme meetings are held and then made to the Grand Court to obtain approval of the scheme. At the convening hearing the Court must be satisfied that all the documentation and information provided will be necessary to enable the schemed creditors to make an informed decision about the scheme. If VP has a plan in place, it must be sanctioned by the Court before it becomes binding. A dissenting creditor has the right to oppose the scheme that has been proposed. The Court will want to be sure that the plan is in compliance with the convening orders, if the majority fairly represents the class and if the arrangement is such that an intelligent creditor, acting in their own interest will reasonably approve **it**.

Commented [BT15]: 2

Commented [BT16]: 10.5

* End of **Assessment** *

Commented [BT17]: 33.5/50 TOTAL MARKS