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**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: 202122-336.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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **8 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 a provisional liquidator is appointed:

1. No action may be commenced against the company without leave of the court.
2. No existing action may be continued against the company without permission of the provisional liquidator.
3. Legal proceedings may be commenced or continued against the company without leave of the court.
4. No action may be commenced against the company.

**Question 1.2**

Which of the following is **not** available in the Cayman Islands?

1. Appointment of a receiver.
2. Court-supervised liquidation.
3. Official liquidation.
4. Deed of Company Arrangement.

**Question 1.3**

Select the **correct answer**.

In a voluntary liquidation:

1. The company may cease trading where it is necessary and beneficial to the liquidation.
2. The company must cease trading except where it is necessary and beneficial to the liquidation.
3. The company must cease trading if it is necessary and beneficial to the liquidation.
4. 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:

1. A company incorporated in the Cayman Islands.
2. A company with property located in the Cayman Islands.
3. A company carrying on business in the Cayman Islands.
4. Any of the above.

**Question 1.5**

Select the **correct answer**.

In a provisional liquidation, the existing management:

1. Continues to be in control of the company.
2. Continues to be in control of the company subject to supervision by the court and the provisional liquidator.
3. May continue to be in control of the company subject to supervision by the provisional liquidator and the court.
4. 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:

1. May enforce their security with leave of the court.
2. May enforce their security with leave of the court provided the liquidator is on notice of the application.
3. May enforce their security without leave of the court.
4. 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:

1. 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.
2. 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.
3. 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.
4. 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?

1. Sums due to company employees.
2. Taxes due to the Cayman Islands government.
3. Amounts due to preferred shareholders.
4. Sums due to depositors (if the company is a bank).
5. 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:

1. The company passes a special resolution requiring it to be wound up.
2. The company does not commence business within a year of incorporation.
3. The company is unable to pay its debts.
4. The board of directors decides it is “just and equitable” for the company to be wound up.
5. 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 scheme of arrangement to be approved:

1. 50% or more representing 75% or more in value of the creditors must agree.
2. 50% or more representing more than 75% f the creditors must agree.
3. More than 50% representing more than 75% of the creditors must agree.
4. More than 50% representing 75% or more in value of the creditors must agree.

**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?

Yes, it is possible to register. However, the Cayman Islands only have centralized public registries for certain assets: real state, ships, aircraft, motor vehicles and intellectual property. In these registers, only mortgages and charges can be registered.

Once the security is registered, an interested party acquiring the asset will be subject and must respect the secured creditor’s interest.

With respect to other assets, security interest must be registered in the register of mortgages and charges of the company owning the asset. It is important to highlight that this type of registration does not grant any priority to the creditor but has the purpose of making the security interest public to third parties.

**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?

Yes, the Cayman Islands Grand Court can provide ancillary relief to foreign bankruptcy proceedings under the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018.

Considering that Cayman Islands aim primarily to protect the interests of creditors, whether local or foreign, the Cayman Islands Grand Court may exercise such power whenever necessary to maximize efficiency in administration of the debtor’s state and to assure parity among creditors.

**Question 2.3 [maximum 3 marks]**

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

Cayman Islands are not party to any international reciprocity treaties, and the only legislation regarding the recognition of foreign judgments is the Foreign Judgments Reciprocal Enforcement Act (1996 Revision). However, such regime applies only to countries that ensure reciprocity in receiving judgments from the Cayman Islands – and even so only after the foreign country has been covered by the Act, and if the foreign judgment is final and related to money.

Nevertheless, it is possible to obtain a local judgment granting enforcement of a foreign judgment outside the above hypotheses through an ordinary procedure governed by The Grand Court Rules, whether the judgment concerns money or not, upon the fulfilment of certain requirements.

**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.

Yes, the official liquidator can pursue claims to hold directors liable for violation of their fiduciary duty to act in the company’s best interest, which includes respecting the relations with its creditors, according to Grand Court’s judgment in Prospect Properties v Mcneill.

It is also possible for the liquidator to apply to Grand Court to order creditors to return an asset in case a payment or disposal of assets is considered a voidable preference, that is, whenever the company director has performed the act with the intention of favouring a certain creditor within six months of the beginning of company’s liquidation proceeding, at the time it was already insolvent.

**Question 3.2 [maximum 6 marks]**

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

The statement is not true. Although there are no specific provisions mentioning receivers in the Companies Act and the Companies Winding Up Rules (2018), Grand Court Rules provides for a series of situations in which receivers may be appointed, mainly tasks related to collecting money and enforcing security rights.

Moreover, considering that Cayman Island insolvency regime does not provide stay of enforcement of creditor’s security rights, receivers can play a very important role in insolvency scenario representing creditors without any court involvement in the process of collection, evaluation and realisation of the asset and payment of the debt.

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

Skull & Crossbones Inc (S & C) is a company registered in the Cayman Islands. It operates a fleet of pirate-themed party ships across central America and the Caribbean. It was founded by the wealthy Rackham family over 50 years ago. The family continues to own and manage the business.

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

S & C has only managed to stay afloat for the past 2 years with the assistance of a very large loan from Sparrow’s Treasure Bank (Sparrow). Sparrow has lent S & C USD 200 million (USD 80 million of which is secured by a mortgage over four of S & C’s largest party boats). The loan facility has now been exhausted. S & C has also fallen behind on the monthly repayments to Sparrow.

There are early signs that the tourism market is starting to pick up again; however, S & C 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 top-shelf rum it will need for its forthcoming booze cruises.

To make matters worse, S & C commissioned Roger Jolly to build 10 more oversized party boats only a few months before the pandemic struck. S & C 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 S & C must pay damages of USD 50 million to Roger Jolly by mid-February 2022. S & C 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:

1. What action can Sparrow take to protect its interests?
2. What action can Roger Jolly take to protect its interests?
3. What action can the unpaid employees take against S & C?
4. Does the Cayman Islands Court have jurisdiction over S & C?
5. Is there a legal route via which S & C can protect itself and seek to restructure?
6. Following on from (e) above, can the Rackham family continue play a part in running S & C during any restructuring process?
7. What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?
8. Sparrow must assure that the mortgage over S & C’s party boats is registered with Cayman Islands vessel ownership central public register to assure priority over third parties.
9. Roger Jolly must initiate an action under The Grand Court Rules to enforce the foreign judgment issued by ICC.
10. The unpaid employees can initiate a common procedure before the Grand Court for a final judgment recognizing payment of owed labour credits and, if enforcement is not successful, file a winding-up petition if the aggregate amounts of credit are not less than KYD 40.
11. Yes, considering that S & C is registered in the Cayman Islands, the Cayman Islands Court has jurisdiction to make winding up orders in respect of S & C irrespective of its place of incorporation pursuant to section 91 of the Companies Act (2021 Revision).
12. Yes, S & C may pursue a scheme of arrangements with its creditors pursuant to section 86 of the Companies Act (2021 Revision) to restructure its liabilities. It is also possible to file a winding-up petition for provisional liquidation under section 104(3) of the Companies Act (2021 Revision) to obtain a court ordered stay against creditors enforcement measures.
13. In case of a provisional liquidation on the grounds that S & C intends to present a scheme of arrangements, it is possible that the Rackham family continue to manage the company. However, it will be the Grand Court that will decide which powers will remain with the Rackham family and which powers will be transferred to the provisional liquidatos pursuant to section 104(4) of the Companies Act (2021 Revision).

**\* End of Assessment \***