



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: **[studentnumber.assessment5C]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2021**. 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 **7 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**.

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.

Commented [BT1]: Correct. 1 mark

Question 1.2

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

- (a) Appointment of a receiver.
- (b) Court-supervised liquidation.
- (c) Official liquidation.

(d) Deed of Company Arrangement.

Commented [BT2]: Correct. 1 mark

Question 1.3

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 [BT3]: Correct. 1 mark

Question 1.4

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.

Commented [BT4]: Incorrect. Answer was 'c'

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 [BT5]: Incorrect. Answer was 'c'

Question 1.6

Select the **correct answer**.

Once a provisional liquidator is appointed:

- (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.

Commented [BT6]: Incorrect. Answer was 'a'

Question 1.7

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.

Commented [BT7]: Correct. 1 mark

Question 1.8

Select the **correct answer**.

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

- (a) 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) 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) 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) 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.

Commented [BT8]: Correct. 1 mark

Question 1.9

Select the **correct answer**.

In order for a proposed 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 [BT9]: Incorrect. Answer was 'd'. However this candidate's mistake is attributable to an error in the wording of para 6.5.2.7 of the Guidance Text. 1 mark is therefore awarded.

Question 1.10

Select the **incorrect statement**.

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

- (a) company passes a special resolution requiring it to be wound up.
- (b) company does not commence business within a year of incorporation.
- (c) company is unable to pay its debts.

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

Commented [BT10]: Correct. 1 mark

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

Commented [BT11]: 7/10 for question 1

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Explain the extent to which it is possible to register security over an asset in the Cayman Islands.

[Type your answer here]

Commented [BT12]: The candidate appears to have confused the formatting here. The answer to 2.1 has been inserted at 2.2.

Question 2.2 [maximum 4 marks]

Explain the legal basis for the Cayman Islands Grand Court's power to assist foreign bankruptcy proceedings and the circumstances in which such powers may be exercised.

[The Cayman Islands does have ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property. These registers are centrally maintained and mortgages and charges can be registered. A third-party purchaser of those assets will be deemed to have notice of any such interest and will therefore acquire the asset subject to the secured creditor's interest.

There is no public security registration regime in the Cayman Islands for other assets. A creditor must therefore take adequate steps to ensure that it has sufficient control over an asset to prevent a third party from purchasing it. Any creditor should therefore review a company's register of mortgages and charges prior to making a loan.

Section 54 of the Companies Law requires that security interests be entered in the register of mortgages and charges of the debtor company. The register must be maintained by the company at its registered office in the Cayman Islands. Failure of a company to update the register of mortgages and charges does not, in and of itself, invalidate any security interest.

Commented [BT13]: Regrettably, the candidate appears to have omitted the answer to question 2.2. 0 marks.

Commented [BT14]: 3 marks for question 2.1

Question 2.3 [maximum 3 marks]

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

Treaties: 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 (save for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards)

The Cayman Islands hasn't signed the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Statute: The Foreign Judgments Reciprocal Enforcement Law does provide a statutory scheme for recognition and enforcement of foreign judgments in circumstances where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgments.

In order to be enforceable, the foreign judgment must be:

- (a) final;
- (b) a money judgment; and
- (c) made after the 1996 Law was extended to the relevant foreign country.

Commented [BT15]: 2.5 marks

Commented [BT16]: Limited to Australia

Common law: Given the limited application of the Foreign Judgments Reciprocal Enforcement Law (1996) the enforcement of foreign judgments is usually achieved by commencing a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation.

Such actions are conducted under the regular procedural regime for litigation in the Cayman Islands (Grand Court Rules).

Money and non-money judgments (including declaratory judgments) are enforceable at common law.

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, the Cayman Islands is ill-equipped to deal with directors who wilfully disregard the interests of creditors.

A Critically discuss this statement and indicate whether you agree or disagree with it, providing reasons for your answer.

There is no statutory provision dealing directly with insolvent trading in the Cayman Islands. However, the terms of a scheme of arrangement may restrict or qualify the company's ability to do certain things (eg, obtaining credit). If provisional liquidators have been appointed in conjunction with the scheme, they may carry on the company's business for the purposes of the restructuring or, less frequently, may supervise the directors of the company in carrying on its business.

Directors may be liable for breach of fiduciary duties if the company continues to incur liabilities while it is unable to pay its debts.

Creditors can stay involved in liquidation proceedings by reviewing the liquidators' reports on the financial status of the company and progress of the liquidation, or have even greater involvement through election to the Liquidation Committee, upon which they can attend court hearings of the liquidators' applications for the court's sanction of proposed dealings with the assets of the company. In a scheme of arrangement, the sanctioning of the scheme itself, once approved by the requisite majority of creditors, is subject to the court's approval. Creditors are entitled to attend the sanction **hearing.**]

Commented [BT17]: 5 marks. Reference could have been made to case law and sections of the Companies Act (s.99, 135, 145, 146, 147 etc)

Question 3.2 [maximum 6 marks]

Receivers have a limited role to play in a Cayman Islands insolvency scenario. Discuss.

[Receivers are not explicitly mentioned in the statutory provisions dealing specifically with **insolvency** (namely the Companies Law). However, the Grand Court Rules (GCR) do contemplate that receivers may be appointed by the Court for the purposes of collecting money, (e.g. rents) or to carry out some other acts such as the execution of a contract or a document of title).

Order 30 GCR governs the appointment and duties of receivers generally. Order 45 GCR deals with enforcement of judgments and orders, provides that a receivers may be appointed to enforce court orders for the payment of money. Secured creditors may appoint receivers to enforce security rights.]

Commented [BT18]: 3.5 marks. Don't forget SPCs.

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

Black Pearl Ltd is a company registered in the Cayman Islands. It operates a fleet of pirate-themed cruise ships across the Caribbean. It was founded by the wealthy Sparrow family over 75 years ago. The family continues to own and manage the business.

In recent years, Black Pearl has been rapidly expanding its cruise ship operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to Covid-19 has badly affected Black Pearl's revenues.

Within weeks Black Pearl is going to default on its loan repayments to Monster Mortgage (Monster). Monster has lent Black Pearl USD 100 million (USD 40 million of which is secured by a mortgage over four of Black Pearl's cruise ships).

Black Pearl has already failed to pay various service providers for several months (tender vessels, food and beverage suppliers, utilities, engineers and mechanics). The payment of utilities is particularly important to the ongoing repair and maintenance of the fleet of vessels at Black Pearl's dry dock facility in Little Cayman.

To make matters worse, Black Pearl has recently lost arbitration proceedings in London in relation to the construction of a new fleet of ships and been ordered to pay damages of USD 50 million to Jolly Roger Inc. It will not be 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 Monster take to protect itself?
- (b) What action can Jolly Roger Inc take against Black Pearl?
- (c) What action can the unsecured trade creditors take against Black Pearl?
- (d) Does the Cayman Islands Court have jurisdiction over Black Pearl?
- (e) Is there a legal route via which Black Pearl can protect itself and seek to restructure?
- (f) Following on from (e) above and assuming there is a legal route via which Black Pearl can protect itself and seek to restructure, can the Sparrow family continue to run Black Pearl during this process?
- (g) Assuming that the Cayman Islands Court has jurisdiction, what factors will the court take into consideration before approving any proposed restructuring?

[(a) An asset subject to a valid security interest falls outside of the liquidation (i.e. it is not an asset that will be realised by the liquidator unless consent is given by the secured creditor to do so) and the secured creditor can enforce its security at any time. The granting of an order for the winding-up of a company does not affect a secured creditor's rights. This is set out in Section 142(1) of the Companies Law, which provides:

"Notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce his security without the leave of the Court and without reference to the liquidator."

Monster can refer to the provision and get **protection**

(b) Jolly Rogers can take actions against black Pearl by invoking the provisions of Section 140(3) of the Companies **Law**

Commented [BT19]: 2 marks. And it can prove for the unsecured amount of 60m pari passu in the liquidation.

Commented [BT20]: 0 marks. Reference should be made to the New York Convention and the Arbitration Law.

"In the absence of any contractual right of set-off or non set-off, an account shall be taken of what is due from each party to the other in respect of their mutual dealings, and the sums due from one party shall be set-off against the sums due from the other."

Section 140(4)

"Sums due from the company to another party shall not be included in the account taken under subsection (3) if that other party had notice at the time they became due that a petition for the winding up of the company was pending."

Any contractual right of set-off or non set-off or netting arrangement agreed between the company and creditor prior to the commencement of the liquidation are binding on the company in liquidation and shall be enforced by the liquidator.

Notwithstanding this position, even if before the commencement of the liquidation the company has not concluded any set-off, non set-off or netting agreement with the creditor, provided that there have been mutual credits, mutual debts or other mutual dealings between the company and the creditor, the liquidator is able to take an account of what is due from each party to the other in respect of those mutual dealings and apply a set off of the sum due from one party against the sums due from the other.

The only exception to this is if the other party had actual notice at the time the sums became due that a winding up petition had been presented and was pending against the company

Jolly Rogers wishing to recover his debt must submit his claim in writing to the liquidator. The document by which this is achieved is referred to as a "Proof of Debt." It is the duty of the official liquidator to adjudicate the creditors' claims, for which purpose he acts in a quasi-judicial capacity.

The following matters must be stated in a creditor's proof of debt:

(a) the creditor's name and address;(b) the total amount of his claim as at the date on which the company went into liquidation;(c) whether or not the claim includes interest and, if so, the basis upon which the creditor claims to be entitled to interest;
(d) particulars of how and when the debt was incurred by the company; and
(e) particulars of the security held by the creditor, the value which he puts on the security and the basis of his valuation. Islands Copies of all the documents evidencing the existence and amount of the debt must be annexed to the proof of debt. If the liquidator requires any further information and/or supporting documents he may request this from the creditor. The liquidator may also require that a proof of debt be verified by affidavit. A proof of debt may be varied or withdrawn at any time, provided there is an agreement between the creditor and the liquidator to that effect.

(c) **unsecured** creditors must be treated pari passu; that is they share equally in the available assets of the company in liquidation in proportion to the debts due to each creditor regardless of their domicile or nationality, subject only to certain limited exception.

In a winding-up under Cayman Islands law, the property of the company must be applied in satisfaction of its liabilities pari passu (as mentioned above, the principle that all unsecured creditors must share equally in the assets or proceeds of the company in the proportion the debts are due) and thereafter will be distributed to the members according to their rights and interests.

This fundamental principle is set out in Section 140(1) of the Companies Law, which provides: "Subject to subsection (2), the property of the company shall be applied in satisfaction of its liabilities pari passu and subject thereto shall be distributed amongst the members according to their rights and interests in the company."

The satisfaction of the company's liabilities on the pari passu basis is subject to certain limited exceptions, which are set out in Section 140(2) of the Companies Law, which provides:

"The collection in and application of the property of the company referred to in subsection (1) is without prejudice to and after taking into account and giving effect to the rights of preferred and secured creditors and to any agreement between the company and any creditors that the

Commented [BT21]: 1 mark. The point is that the unsecured creditors have standing to apply for liquidation (section 92-94) or the appointment of a PL (section 104) then submit a proof of debt.

claims of such creditors shall be subordinated or otherwise deferred to the claims of any other creditors and to any contractual rights of set-off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multi-lateral set-off or netting arrangements between the company and any person or persons) and subject to any agreement between the company and any person or persons to waive or limit the same.”

(d) Grand Court of the Cayman Islands has jurisdiction in this case.

Commented [BT22]: ½ mark

Commented [BT23]: Answers to (e), (f) and (g) are missing.

Commented [BT24]: 3 ½ marks for question 4.

*** End of Assessment ***

Commented [BT25]: Total marks for this candidate = 24.5

Mark adjusted to 25/50 – Course Leader