



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.**
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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]: Correct. 1 mark

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]: Correct. 1 mark

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]: Correct. 1 mark

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.

Commented [BT8]: Correct. 1 mark

(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.

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]: 10/10 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.

The Cayman Islands have ownership registers for real estate, ships, aircrafts, motor vehicles and intellectual property. Mortgages and charges can be registered in the ownership registers for the abovementioned classes of assets. A purchaser of the abovementioned assets will need to check the above registers before acquiring the asset.

Commented [BT12]: Why? Because registration gives the registered person priority. 2 marks awarded. More detail required in order to earn full marks.

Section 54 of the Companies Law requires that security interests be entered in the register of mortgages and charges of the debtor company and the register must be maintained by the company at its registered office in the Cayman Islands. It is noted that any failure of a company to update the register of mortgages and charges does not, invalidate any security interests and any registration in the register of mortgages and charges does not create priority.

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 Grand Court's powers to make orders in support of foreign insolvency proceedings, are provided for in Part XVII of the Companies Law.

Commented [BT13]: 4 marks

As there are no threshold tests for the grant of assistance, nor are there automatic rights based on the centre of main interests of the debtor – The Cayman Islands has not implemented the UNCITRAL Model Law on Cross-border Insolvency, representatives of foreign proceedings must satisfy the Cayman court that it is appropriate for the Grand Court to exercise discretion of granting the relief sought by the foreign representative if the application seeking assistance.

Per Section 242 of the Companies Act, in determining whether to make an ancillary order under Section 241 of the Companies Act (Upon application of a foreign representative, the Grand Court may make orders to assist with foreign proceedings), the Grand Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with

- (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
- (b) the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
- (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
- (d) the distribution of the debtor's estate amongst creditors substantially in accordance with the statutory order of priority;
- (e) the recognition and enforcement of security interests created by the debtor;
- (f) the non-enforcement of foreign taxes, fines and penalties; and
- (g) comity.

It is noted that the Cayman Islands is a member of Judicial Insolvency Network and has adopted the Judicial Insolvency Network Guidelines for Cooperation in Cross-Border Insolvency Matters (JIN Guidelines). Such guidelines have been designed to enhance communication between courts, insolvency representatives and other parties.

Question 2.3 [maximum 3 marks]

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

S 3(1) of The Foreign Judgements Reciprocal Enforcement Law (1996 Revision) provides a statutory scheme for recognition and enforcement of foreign judgments in Cayman Islands. However, the recognition and enforcement of foreign judgments will only be granted under circumstances where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgments.

Thus, the recognition 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 obligations.

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

With reference to *Bandone v Sol Properties 2008 CILR 301*, both money and non-monetary judgments are enforceable at common law.

The mandatory requirements for enforcement of a foreign judgement at common law are:

- (a) the judgment is final;
- (b) the foreign court had jurisdiction over the debtor;
- (c) the foreign judgement was not obtained by fraud;
- (d) the foreign judgement is not contrary to public policy of the Cayman Islands; and
- (e) the foreign judgement was not obtained contrary to the rules of natural justice.

Once a local judgment has been obtained, the full range of domestic enforcement remedies are available noting the six-year limitation period applies both for common law enforcement and under the 1996 Foreign Judgements Reciprocal Enforcement 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.

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

While there is an absence of a statutory prohibition on insolvent trading, directors can (and continue to be) made personally liable to the company for any losses which they cause to the company if they act in breach of their fiduciary duty to act in the best interest of the company.

The directors' duty is to act in the best interest of the company and to have regard to the interests of its creditors. It is in the interest of the creditors to be paid and it is in the interest of the company to be safeguarded against being put in a position where it is unable to pay.

Commented [BT14]: 2 marks. More detail required for full marks.

Where a director breaches any of his common law or fiduciary duties, the company can take action to recover its property or to obtain payment of damages from the director as compensation for the loss incurred.

In *Prospect Properties v McNeill* 1990-91 CILR171, it was held that "it is well established that one of the fiduciary duties owed by a Director to his company is the duty to act in the best interest of that company".

Further, in *Argentine Holdings (Cayman) Limited v Buenos Aires Hotel Corporation S.A and Seven Others* 1997 CILR 90, it was held that "by virtue of their fiduciary positions, directors owe strict duties to act *bona fide* in the best interest of their company and to act only for a proper purpose".

It should be noted that, pursuant to the Companies Law, liquidators have a wide range of powers to take action against directors who have acted in breach of their duties.

Directors are under a statutory duty to co-operate with liquidators (Section 103(2) of the Companies Law) and the liquidators can apply to Court for an Order for the examination of a director under Section 103 of the Companies Law and that the director transfer or deliver to the liquidators any property or documents belonging to the company, which failure to do so may amount to a criminal offence under Section 136(1) of the Companies Law.

In conclusion, while I agree that there is indeed an absence of a statutory prohibition on insolvent trading, I disagree that the Cayman Islands is ill-equipped to deal with directors who wilfully disregard the interests of creditors. Official liquidators are able to and appears to continue to pursue claims against these directors (that breach their fiduciary duty) on behalf of the company by taking action through the local judicial system (as appears to be the case in Cayman Islands as evident by the cases cited above).

Commented [BT15]: 7 marks. Specific reference might also have been made to sections 99, 135, 145, 146, 147 Companies Act.

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 however the Grand Court Rules do contemplate that receivers may be appointed by the Court for the purposes of collecting money or to carry out some other act.

Order 30 Grand Court Rules governs the appointment and duties of receivers generally.

Order 45 Grand Court Rules states that receivers may be appointed to enforce court orders for the payment of money.

Specifically Order 45 rule 1 (1)(d) which states a judgement or order for the payment of money, not being a judgment or order for the payment of money into Court, may be enforced by the appointment of a receiver.

Order 45 rule 1 (2)(a) states that a judgment or order for the payment of money into Court may be enforced through the appointment of a receiver.

Order 51 Grand Court Rules also provides for the appointment of receivers by way of equitable execution. Rule 1 states that where an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is just or convenient that the appointment should be made shall have regard to the amount claimed by the judgment creditor, to the amount likely to be obtained by the receiver and to the probable costs of his appointment and may direct an inquiry on any of these matters or any other matter before making the appointment.

Receivers and receivership orders are specifically provided for by statute in respect of a particular type of Cayman Islands legal entity, namely the Segregated Portfolio Company (“SPC”).

Receivers can be appointed without any court involvement pursuant to rights in a security instrument. A holder of a fixed or floating charge can, if the charging document specifically provides for it, appoint a receiver over the company’s charged assets if a debtor defaults.

It is noted that in this scenario, the receiver is not supervised by the court and usually owes its duties to the creditor rather than the debtor company.

Under a winding up petition, the debtor (company) can obtain a stay against creditor action if it has been placed into liquidation (including provisional liquidation). However, under Section 142 of the Companies Law, the moratorium granted by the court does not apply to secured creditors i.e. secured creditors are not prohibited from enforcing their security notwithstanding the Court granting a stay against creditor action.

The involvement of receivers in an insolvency scenario is limited, due to the nature of the role they play in an insolvency where their participation in an insolvency/ liquidation is only to the extent of realizing the secured assets when a debtor defaults, therefore, in the context of insolvency scenarios, it can be reasonably concluded that receivers have a limited role to play in a Cayman Islands insolvency scenario.

Commented [BT16]: 4.5 marks.

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?

Question (a)

Per CWR, O.17, a creditor with security over an asset of a company is entitled to enforce its security even after the company is placed into official liquidation or provisional liquidation. The secured creditor may do so without the leave of the Grand Court and without any reference to the company's liquidator.

As Monster's USD40million facility is secured by a mortgage over four of Black Pearl's cruise ships, as mortgagee, it is a secured creditor and therefore could immediately seek to enforce against the four Cruise Ships which it has a charge over without seeking leave from the Court to protect itself.

The remaining USD60million will then fall into the "unsecured creditor" category and rank *pari passu* with all of Black Pearl's other unsecured creditors.

Commented [BT17]: 2 marks

Question (b)

Section 94 of the Companies Law states that an application to the Court for the winding-up of a company must be by petition presented either by

- (a) The company;
- (b) Any creditor;
- (c) Any shareholder of the company; or
- (d) The Cayman Islands Monetary Authority

A company may be wound up by the Grand Court if (amongst others) the company is unable to pay its debts.

A company is deemed to be unable to pay its debts if

- (a) A creditor to whom the company owes a sum exceeding KYD100 has served on the company a demand requiring the company to pay the sum due and the company has not been paid for 21 days after the demand;
- (b) Execution of other process issued on a judgment, decree or order obtained in the court in favour of any creditor in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or
- (c) It is proved to the satisfaction of the Court that the company is unable to pay its debts.

Commented [BT18]: 1.5 marks. Reference should have been made to the procedure for enforcing a foreign arbitral award (New York convention and Arbitration Act)

According to the facts of the case, Black Pearl is unable to pay damages of USD50million awarded to Jolly Roger Inc. Per Section 139 of the Companies Law, the damages of USD50million constitutes a provable debt and therefore constitutes an admissible claim against Black Pearl.

Therefore, per Section 94 of Companies Law, Jolly Roger Inc. can petition for the winding-up of Black Pearl to the Court on the basis that 1. per Section 93 (b) of the Companies Law, Black Pearl is unable to honour the Court's order of reimbursing Jolly Roger USD50 million; or 2. per Section 93(c) of the Companies Law, Jolly Roger Inc. proves that Black Pearl is unable to pay its debts as it is cash – flow insolvent.

Question ©

Preferential debt ranks second in the order of priorities in an official liquidation (after liquidation expenses). Preferential debt comprises of:

- (a) Sums due to employees;
- (b) Taxes due to the Cayman Islands government;
- (c) Sums due to depositors (if the company is a bank);
- (d) Unsecured debts which are not subject to subordination agreements

Unsecured trade creditors fall into the fourth category above. Therefore, the unsecured creditors can file a petition for the winding-up of Black Pearl Ltd.

Noting that as 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, it is noted that if a request is made by the liquidator or provisional liquidator of Black Pearl for the continued provision of electricity, water or telecommunications, the relevant utility supplier may make it a condition of the provision of such supply that the liquidator personally guarantees the payment of any charges in respect of that supply.

Commented [BT19]: 1.5 marks. The unsecured creditors have standing to apply to wind up the company.

Question (d)

Per Section 91 of Bankruptcy Law, the Grand Court of the Cayman Islands has jurisdiction to make winding – up orders in respect of companies which are either:

- (a) Incorporated in the Cayman Islands;
- (b) Incorporated elsewhere but subsequently registered in the Cayman Islands; or
- (c) In respect of a foreign company which –
 - i. Has property located in the islands;
 - ii. Is carrying on business in the islands;
 - iii. Is the general partner of a limited partnership; or
 - iv. Is registered under Part IX (a so-called "overseas company").

Therefore, the Cayman Islands Court has jurisdiction over Black Pearl Ltd as Black Pearl Ltd is a company registered in the Cayman Islands.

Commented [BT20]: 1 mark

Question (e)

Per section 104(3) of the Companies Law, Black Pearl Ltd could make an *ex parte* application for provisional liquidation on the grounds that:

- (a) As noted in response to Question (b) above) based on the facts of the case, Black Pearl will default on its debts as it falls due (due to being cash-flow insolvent);
- (b) Black Pearl has intentions to present a compromise or arrangement to its creditors.

Pursuant to Section 97 of the Companies Law, once a provisional liquidator is appointed, no action or proceeding may be commenced or continued against Black Pearl without the leave of the Grand Court.

Therefore, through provisional liquidation, Black Pearl will have the protection of an automatic stay and breathing space whilst it seeks to restructure.

Commented [BT21]: 2 marks. Coupled with a scheme under section 86.

Question (f)

Upon the appointment of provisional liquidators, the Grand Court will determine which powers will remain with the directors and which will be vested in the provisional liquidators. Sometimes directors may be relieved of control entirely.

In this situation, Black Pearl is placed into provisional liquidation for the purpose of securing breathing room from creditors while it restructures its debts. Therefore, the Sparrow family may remain in control of Black Pearl subject to oversight by the provisional liquidators.

Commented [BT22]: 1 mark

Question (g)

In order for a proposed scheme to be approved, a majority in number (that is, over 50%, representing over 75% in value of the creditors (or class of creditors, or members or class of members, as the case may be), present and voting either in person or by proxy at the meeting, must agree to the compromise or arrangement.

Pursuant to Section 86(2) of the Companies Law, if the scheme has the necessary creditor support, the compromise or arrangement must still be sanctioned by the court before it is binding on all the creditors (or the class of creditors, or on the members or class of members, as the case may be), the company and its contributories.

It is noted that a creditor objecting the compromise or arrangement has the right to oppose the scheme at the sanction stage, although its options will be limited at this stage.

The Cayman Islands Court, in deciding whether to sanction the proposed restructuring of Black Pearl Ltd, will take the following into consideration:

- I. Compliance with the convening orders;
- II. Whether the majority creditors (or class of creditors, or members or class of members, as the case may be), fairly represent the class;
- III. Whether the arrangement is such that an intelligent, honest member of the class convened, acting in his own interest, might reasonably approve it.

Commented [BT23]: 3 marks.

Commented [BT24]: 12 marks for question 4.

*** End of Assessment ***

Commented [BT25]: Total marks for this candidate = 41.5