



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]: Incorrect. The answer was 'd'.

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.

Commented [BT7]: Correct. 1 mark

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

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

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]: Correct. 1 mark

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]: 9/10 marks 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.

Answer 2.1

In Cayman Islands, there is no public security registration regime for assets other than few specified assets such as real estate, ships, aircraft, motor vehicles and intellectual property.

Commented [BT12]: And what is the affect of registering here? Notice? Priority? 1.5 marks awarded.

Registering a security interest in the register of mortgages maintained by the company under section 54 of companies law, will not itself create a priority but an inspection can be done and accordingly a notice can be sent to the third parties.

The register of mortgages and charges are maintained by the company at its registered office and does not itself invalidate the security interests.

Hence, the registration is possible without affecting the priority rights. It is only a mechanism to maintain records for public scrutiny.

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.

Answer 2.2

As regards the cross-border proceedings of insolvency or bankruptcy, Cayman Islands has not adopted the Model Law on Cross-Border Insolvency so the concept of Centre of Main Interests (COMI) is not relevant here. However, FBPR, 2018 has been introduced which lays down procedures for recognition of foreign representative and seek legal assistance.

The foreign representative has to satisfy the Court in Cayman Islands that it would be appropriate for the court to exercise its discretion by granting a relief sought in representatives application.

Various forms of reliefs that are available are:

- Recognition to right of foreign representative to act in Cayman Islands for the debtor.
- Imposing a stay/ moratorium on legal proceedings.
- Imposing a stay/ moratorium on enforcement of judgements.
- Imposing a stay/ moratorium on legal proceedings.
- Requiring the examination of person who possesses certain information.
- Handing over the assets to foreign representative.

Section 242 further lays down the circumstances in which the above mentioned discretionary relief is to be exercised which includes:

- Giving an equal treatment to all the claim holders irrespective of domicile.
- Protection of local creditors.

- Prevention of avoidable transactions.
- Follow the statutory order of distribution.
- Recognition and enforcement of security interests.
- Non-enforcement of foreign taxes and charges.
- Mutual Recognition following the principles of comity.

Commented [BT13]: 4 marks

Question 2.3 [maximum 3 marks]

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

Answer 2.3

In order to recognise foreign judgements, the Grand Court of Cayman Islands have adopted a very co-operative approach to ensure effective winding up and protection of interests of creditors.

Commented [BT14]: 2 marks. What has been written is accurate but more detail required for full marks.

Various methods of recognising foreign judgements are as follows:

- Treaties: Currently Cayman Islands is not signatory to any treaty for reciprocal arrangement to recognise judgements.
- Legislation: Foreign Judgements Reciprocal Enforcement Law does provide a statutory scheme for recognition and enforcement when the originating country assures reciprocity.
- Common Law Principles: This involves commencement of new action for the unpaid debt or default by citing the foreign judgement subject to certain conditions.

It is pertinent to note here that the enforcement of judgements is also subject to a limitation period of 6 years.

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.

Answer 3.1

In Cayman Islands Insolvency regime there is no statutory requirement on the directors of a company to file for insolvency. The companies law also does not prohibit the directors to trade during the insolvency period or prior to commencement of insolvency.

Usually the management tries to engage in some wrongful transactions such as giving preference to a creditor or selling an asset at an undervalued price or misappropriating an asset. Therefore, many jurisdictions contain certain prohibitions on transactions during this period.

In the case of *Prospect Properties vs McNeill* the court has held that when the company is insolvent the directors are under a duty to act in the best interests of the company as they have to safeguard the interests of the creditors.

Though there is no strict legislation holding directors liable for insolvent trading, the directors can be made personally liable for any loss caused to the company if they have acted in breach of their fiduciary duties towards the company.

I disagree with the above statement for the simple reason that the judicial principles have been developing across various jurisdictions which have time and again held that the directors could be held liable for any wrongful insolvent trading which creates a burden on the estate and affects the creditors interests. Further, on account of recognition of foreign judgements, such principles can be very well imported from other jurisdictions.

Therefore, Cayman Island along with its courts is not poorly equipped to deal with directors who wilfully disregard the interests of creditors.

Commented [BT15]: 6 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.

Answer 3.2

The concept of receivership is not formally provided in the Cayman Island's insolvency legislation. But the rules of Grand Court (GCR) do provide that the receivers may be appointed for the limited purpose of collection of money or carry out some act. Order 30, 45 and 51 govern the appointment and functions of receivers.

Receivership is primarily used by special nature entities such as Segregated Portfolio Companies (SPC) which is a kind of special purpose vehicle holding different assets and liabilities in their name. Receivers are responsible for orderly closure of their business and distribution of assets.

In some instances, creditors also use the services of receivers without the court involvement. A creditor may appoint a receiver over a charged asset to administer, sell and realise the money.

Commented [BT16]: 4 marks. Short but accurate.

Considering the above, it can be concluded that the receivers do have a limited role to play in a Cayman Islands Insolvency scenario.

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?

Answer 4

- (a) Monster is partly-secured and partly-unsecured creditor. As regards its secured portion of debt, it can seek to enforce the same irrespective of the fact whether the Black Pearl is placed into Liquidation or not. Since the ships are mortgaged the Monster can seek possession of such ships and sell them. As regards the unsecured portion of USD 60 million, it has to prove its claim during Liquidation to receive as per the priority rule.
- (b) Jolly roger inc. is the recipient of an arbitration award in London. However, Cayman islands are a signatory to the New York Convention on Recognition of Foreign Arbitral Awards which would make the award binding and enforceable on Black Pearl.
- (c) Unsecured creditors are entitled to initiate winding up proceedings.
- (d) Yes, the Cayman Islands have a jurisdiction over Black Pearl as it is a company registered in the Cayman Islands.
- (e) Cayman Islands is known for its consensual restructuring jurisdictions which are also supported by the courts. One way of doing the restructuring is by way of Scheme of Arrangement. Another prominent way is the placement of debtor into Provisional Liquidation as the latter also allows a moratorium or a stay. Though the stay does not affect the power of a secured creditor to enforce its security, it can certainly stop the continuation of existing proceedings and other unsecured creditors from enforcing their rights. Provisional Liquidation enables the company to opt for scheme of arrangement by giving few months time.
- (f) Sparrow family which is part of the management is allowed to run the company and retain the control in case of Provisional Liquidations subject to the supervision of

Commented [BT17]: 2 marks

Commented [BT18]: 1.5 marks

Commented [BT19]: 1 mark

Commented [BT20]: 1 mark

Commented [BT21]: 2 marks. The key is to combine a section 86 scheme with a section 104(3) PL thereby achieving a moratorium under section 97.

Commented [BT22]: May be allowed. ½ mark.

Provisional Liquidators and the Grand Court. In any case If it opts for the scheme of arrangement then the management is responsible for running the business.

- (g) While approving a restructuring plan by way of the scheme of arrangement, the courts will look into the necessary approvals by way of voting from the creditors, whether necessary creditor support was provided and whether compliance to the orders have been done.

Commented [BT23]: 1 mark

Commented [BT24]: 9 marks. More detail would have resulted in a higher score on question 4.

*** End of Assessment ***

Commented [BT25]: Total marks for this candidate = 35.5