



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:

- (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 [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. 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.

Commented [BT3]: Correct. 1 mark.

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.**

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**.

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 [BT6]: Correct. 1 mark.

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.

Commented [BT7]: Incorrect. Answer was B.

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.

Commented [BT8]: Correct. 1 mark.

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 [BT9]: Correct. 1 mark.

Question 1.10

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 [BT10]: Correct. 1 mark.

Commented [BT11]: 8/10 for this section

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, a creditor can register its security over an asset and there are many types of security arrangements over both movable and immovable property.

Depending on the type of asset, a creditor can officially register their security. Registers exist for assets such as vehicles, real estate, and intellectual property. Purchasers of said assets are notified of any charges against the assets. For other assets, the creditor must have it entered in the company's list of charges. However, this does not automatically provide a priority or perfection and so creditors must be careful when securing assets that cannot be centrally registered.

Commented [BT12]: 3 marks

Having security allows the creditor to enforce its security if there is a default, subject to the contract. The effect is that even in the case of a winding up order, the creditor can still enforce its security, i.e. the stay or moratorium is not applicable to them. This provides them with an advantage over other creditors to recover funds.

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, under part XVII of the Companies Act, the Grand Court has the power to assist foreign bankruptcy proceedings. However, there are no automatic rights or thresholds as UNCITRAL is not in place. The Grand Court may exercise its power when it is satisfied that it is an appropriate order to make. A foreign representative will argue for the actions they wish the Court to approve and must convince the Court that these actions are beneficial, efficient, and appropriate.

Commented [BT13]: 3 marks. The examiner was looking for the candidate to make reference to the statutory test under s242 for full marks.

Question 2.3 [maximum 3 marks]

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

UNCITRAL is not in place and the Cayman Islands has no international treaties in reference to recognition of foreign judgements.

While there is the Foreign Judgements Reciprocal Enforcement Act, which offers the opportunity for recognition subject to reciprocity, this has not been used often and thus far, has only allowed for recognition of Australian judgements. Therefore, the typical way to gain recognition is for a new proceeding to be conducted for the outstanding obligation from the foreign judgement. By starting a new proceeding, enforcement can be done using common law and The Grand Court Rules, as long as the foreign judgement is final, not obtained by fraud or contrary to the rules of natural justice, not contrary to Cayman Islands public policy, and from a court which had jurisdiction over the debtor.

Commented [BT14]: 3 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.

Yes, while wrongful trading is not prohibited, should a company go into official liquidation, the liquidator can seek to hold directors accountable for not complying with their fiduciary duties.

The official liquidator can apply to the Grand Court, on behalf of the insolvent company, for the directors to be held liable for the losses they incurred by trading while insolvent. If successful, the directors would have to pay financial damages to the company/creditors.

Directors have a duty to act in the best interest of the company and this includes ensuring that creditors are paid.

Similarly, a creditor could sue a director for breach of its fiduciary duties.

Commented [BT15]: 2 marks. Candidate was expected to refer to the case law and statutory provisions (e.g sections 99, 135, 145, 146, 147 etc)

Question 3.2 [maximum 6 marks]

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

Receivers can be appointed in the Cayman Islands, but typically have functions not directly related to an insolvency proceeding, such as collecting funds.

Private receivers can be appointed by a secured creditor subject to the security agreement. If a debtor defaults on its obligations, the security agreement can allow for a receiver to be implemented. The receiver's role is to ensure the secured assets remain intact and protected until a sale can be finalized so that the secured creditor can recoup its loan.

Private receiverships tend to lead to additional risk and exposure for the receiver (compared to court appointed receivers) as there is no court supervision, direction, or protection. The receiver must ensure that it has a security opinion that indicates that the creditor's security is valid and enforceable and that the security agreement allows for the appointment of a private receiver. The receiver must understand its role and the actions the receiver can take under

the security agreement. The receiver also has to ensure that it has indemnities from the secured creditor and that the secured creditor is willing to fund the receivership by providing a receiver's charge for the receiver which is above the secured creditor.

Commented [BT16]: 4 marks. GCRs? SPCs?

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:

- (a) What action can Sparrow take to protect its interests?
- (b) What action can Roger Jolly take to protect its interests?
- (c) What action can the unpaid employees take against S & C?
- (d) Does the Cayman Islands Court have jurisdiction over S & C?
- (e) Is there a legal route via which S & C can protect itself and seek to restructure?
- (f) Following on from (e) above, can the Rackham family continue play a part in running S & C during any restructuring process?
- (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?

a) Sparrow should ensure that its security has been registered and that it is valid and enforceable. Ships have a central registry and thus Sparrow needs to have their security registered in the proper manner. Sparrow could enforce its security of \$80 million on the 4 boats as a default has occurred. However, should these boats be taken and sold, Sparrow is unlikely to recover their unsecured debt as this would diminish the earning potential of S&C. To enforce its security, Sparrow could appoint a private receiver if the security agreement allows for one. This will allow Sparrow to keep a closer eye on the operations of S&C and ensure that the company is operating in good faith. Alternatively, Sparrow could propose a scheme of arrangement with S&C's consent. The scheme would probably require DIP financing. Sparrow would have to decide if providing additional funds will improve their recovery. The DIP financing would cover ongoing costs of maintaining and running the cruises, such as the cost of rum. Sparrow would want a provisional liquidator in place prior to providing DIP financing in order to protect its interests and provide a priority for the financing provided.

b) Roger Jolly has a foreign judgement. As such, Roger Jolly would need to bring forth local proceedings under common law in order to be able to enforce their judgement once their debt has not been paid (i.e. after mid-February).

c) Employees have a preference for unpaid wages that ranks second in the priority scheme of official liquidations behind liquidation expenses. They are also ranked below any secured creditors. The employees could apply to the court for a winding up order and they would be paid, subject to available funds, as a part of the liquidation.

d) Yes, S&C is registered in the Cayman Islands so the Grand Court has jurisdiction.

e) S&C could apply for a provisional liquidation in order to obtain a stay of proceedings. This would prevent Sparrow or Roger Jolly from pursuing further action, but it would not prevent Sparrow from enforcing on its security. In addition, they could present a scheme of arrangement to their creditors. S&C would need to approach a lender, possibly Sparrow, to fund the scheme. S&C could also enter a voluntary or official liquidation by passing a special resolution to wind up the company. A voluntary liquidation does not provide a stay, so this would not be an ideal option for S&C.

f) The family cannot continue running S&C once the company is put into official liquidation. If the company is in provisional liquidation, the family may continue running the company subject to supervision from the provisional liquidator. In other cases, the family can continue running the company.

g) The Court will ensure that the scheme is fair and that all creditors have received proper notice and were given the opportunity to vote. Creditor support is also required prior to the Court approving the scheme.

*** End of Assessment ***

Commented [BT17]: Pretty good answer overall. 2 marks. Examiner was looking for candidate to reference ability of secured creditor to enforce its security (which should be centrally registered given it concerns vessels) outside of liquidation proceedings (s.142). Also, that Sparrow has standing as an unsecured creditor to petition to wind up S&C. It may therefore choose to help S&C restructure via a work out or alternatively as part of a court supervised process depending on its view of the likely recovery in each scenario.

Commented [BT18]: 1 mark. RJ can apply for recognition and enforcement of the arbitral award since the New York Convention has been extended to the Cayman Islands. The key point is that RJ has to apply to have the judgment recognised in the Cayman Islands. Once it does so, a range of enforcement remedies become available to it, including a charging order, writ of execution, examination of judgment debtor, attachment of earnings, garnishee proceedings and the ability to petition to wind up S&C (since RJ will be an unsecured creditor). If winding up petition has already been filed, there may be a moratorium preventing JR from taking any of the enforcement actions mentioned above in which case it will be left to file a proof of debt for its US\$50m as part of the official liquidation.

Commented [BT19]: 1.5 marks. The unpaid employees can sue S&C for the unpaid debts (provided a winding up petition has not yet been filed). Alternatively, they can apply to wind up under section 92 - 94 Companies Act or apply to apply to appoint provisional liquidators under 104 (if they are concerned about mismanagement or wish to support a court-supervised restructuring). If an order is made that S&C be liquidated, the sums due to the employees rank as preferential debts (section 141) ahead of certain other creditors.

Commented [BT20]: 1 mark.

Commented [BT21]: 2.5 marks. The Court may, at any time after the presentation of a winding up petition but before making a winding up order, appoint provisional liquidators (PLs). An application may be made *ex parte* by the company (S&C) on the grounds that it is, or is likely to become, unable to pay its debts and intends to present a compromise or arrangement to its creditors in accordance with section 104(3) of the CICA. In the event that a winding up petition is presented by a creditor, S&C could respond by seeking to appoint provisional liquidators. The appointment of PLs would ensure that no action or proceedings may be commenced or continued against the S&C without the leave of the Court as per Section 97 of the CICA (statutory moratorium). Under the supervision of the Court and the JPLs, S&C could then explore a restructuring.

Commented [BT22]: Might not can. Depends on the terms of the PL order. 1/2 mark.

Commented [BT23]: 1.5 marks. Factors include:

1. The meeting was properly convened (in accordance with the court's initial order)
2. Proposal approved by over 50% in number representing 75% or more in value of the creditors (or class of creditors) present and voting
3. whether the majority of Stakeholders voting acted in good faith, were a fair representation of the relevant Class
4. that the Scheme is better than the result would be if the company were wound up, and
5. that an intelligent and honest member of the Class would agree that the Scheme should be approved.

Commented [BT24]: Total mark for assessment 33/50