



**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]:** Incorrect. Correct answer is A

#### **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**

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]: Correct. 1 mark.

### 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]: 9/10 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?

It is possible for a creditor to register its security (mortgages and charges) over certain assets in the Cayman Islands. These specific categories of assets include ships; aircrafts; motor vehicles; real estate; and intellectual property. A creditor may also register its security in a company's register of mortgages and charges, where the company in question is the debtor.

The registers in relation to real estate, ships, aircrafts, motor vehicles and intellectual property are all centrally maintained and a purchase of any of those categories of assets will be on notice of any security interest registered against such assets and will purchase the asset in question subject to such security.

In the Cayman Islands, the rules on priority will be determined by the situs of the asset in respect of which the security is registered.

In a company context, registering a security interest on a company's register of mortgages does no more than give notice of the security to third party. It does not create priority for the security.

Commented [BT12]: 3 marks

#### 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?

Commented [BT13]: 4 marks

Yes, the Cayman Islands Grand Court has the power to assist foreign bankruptcy proceedings. This power is provided for in Part XVII of the Cayman Islands Companies Act, and in particular section 241.

Section 241 of the Act empowers the court to make ancillary orders upon the application of a foreign representative. For the purposes of this section, a foreign representative is defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.

Section 241 of the Act provides that ancillary orders can be made for the following purposes:

- (a) recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor;
- (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- (c) staying the enforcement of any judgment against a debtor;
- (d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
- (e) ordering the turnover to a foreign representative of any property belonging to a debtor.

Section 242 of the Act goes on to provide the criteria for exercise by the Court of its discretion to grant ancillary orders to assist foreign bankruptcy proceedings. That section provides that in exercising its discretion to grant ancillary orders under section 241 of the Act, the 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 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 order prescribed by Part V;
- (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.

**Question 2.3 [maximum 3 marks]**

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

There are two regimes by which foreign judgements may be enforced in the Cayman Islands. The first is through statute – the Foreign Judgments Reciprocal Enforcement Act (1996 Revision). In order to be enforced under statute, the judgment in question must be final, for a money judgment and must be made after the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) was extended to the country in question. This statute however has very limited applicability as it only applies to countries which offer substantial reciprocity in the enforcement of Cayman Islands judgments. At present the only country to which the legislation applies is Australia.

The second regime is by bringing a new action for the recovery of the debt under the common law. Both money and non-money judgments are enforceable under the common law, provided that the judgment is final, was not obtained by fraud, is not contrary to public policy in the Cayman Islands, nor was it obtained contrary to the rules of natural justice, and lastly, that the court whose judgment is sought to be enforced, 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.

When a company is in official liquidation, the official liquidator can bring a claim for breach of fiduciary duties against the former directors of the company, if the liquidator believes that the former directors have acted contrary to the best interests of the company, by for instance, allowing the company to continue trading/operating in a “business as usual” fashion or where the former directors are considered to have acted for an improper purpose, such purpose not being in the interests of the company and/or its creditors.

All claims against former directors will, when a company is in official liquidation, be brought by the liquidator. Creditors do not have standing to bring such a claim but the benefit derived in a successful application by a liquidator will be for the company’s creditors as a whole.

Where a claim is brought against a former director, the claim will be brought by the official liquidator in the company’s name and on behalf of the company and the former director will be personally liable for any damage suffered by the company as a result of his actions.

The remedies which the liquidator can seek include orders that the company’s former director compensate the company in damages or the liquidator may seek an order requiring the return of money paid out by the director which it is shown should not have been made – a “claw back” remedy.

In the case of Prospect Properties Limited (in liquidation) v McNeill and J.M. Bodden II [1990-91 CILR 171], the Grand Court gave judgment in favour of the liquidators of Prospect Properties Limited (in liquidation) who sought to recover money paid by the company to its former directors in breach of their fiduciary duties as former directors. In the alternative, the liquidators also sought the recovery of the funds on the basis that the former directors held those funds as constructive trustees for the company.

The Grand Court reasoned that “the defendants, as directors, were in breach of their fiduciary duty to the company, which extended to its customers and creditors and was independent of and paramount to any duty they might have had as shareholders to act *bona fide* for the benefit of the company.

Further, and independently the fact that they were directors, the court found that they were constructive trustees of the funds received from the company, since they had caused those funds to be improperly paid over by the company. The first defendant, having received the money was also liable to account to the company for that money.

The last form of compensatory remedy that can be sought against a former director by a liquidator is in the instance of fraudulent trading where it is believed by the liquidator and confirmed by the court that the business of the company was carried on in a manner to defraud creditors. In this scenario, the court may make liable any person who participated in the perpetration of the fraud, liable to make contributions to the company’s assets (Companies Act 2022, section 147).

In addition to claims of the nature as above, the court also has scope to “claw back” dispositions where any payment or disposition of property is made in the six months immediately before the winding up petition is filed, if at that time, the company was unable to pay its debts and if the intention behind the disposition or payment out, was to give the receiving creditor a preference over another creditor.

Similarly, where a company’s directors dispose of assets and it is shown that the assets were disposed of at an undervalue and for the purpose of defeating an obligation owed to a creditor,



then that transaction can be avoided. Such an application must be brought within 6 years of the disposal. |

**Commented [BT15]:** 6 marks. Decent answer which would have benefitted from greater reference to the statutory provisions (e.g. 99, 135, 145, 146)

### Question 3.2 [maximum 6 marks]

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

Although receivers are not specifically referenced in the Companies Act and the Companies Winding Up Rules in the provisions which deal with insolvency, receivers still have an important role to play in a Cayman Islands insolvency proceedings. This is evidenced by the provisions in the Grand Court Rules which provide for the appointment of receivers in specific scenarios. Such scenarios include the appointment of receivers to enforce court orders in relation to the payment of money (Order 45 of the GCR); and the appointment of receivers by way of equitable execution where it is just and convenient (Order 51 of the GCR).

In addition, the appointment in relation to Segregated Portfolio Companies (SPCs), is placed on legislative footing in the Cayman Islands. In this regard, if the Court considers that an SPC's assets attributable to a particular portfolio, are not sufficient to discharge claims of creditors, then the Court has a discretion to appoint a receiver in respect of that portfolio. In this context, any receivership order that is made must be managed by the receiver named in the order and that receiver's mandate will be to ensure the orderly termination of the business of or attributable to the segregated portfolio over which he is appointed, and the distribution of the assets of the segregated portfolio to those who are entitled to receive the proceeds.

If the SPC is in the process of being wound up, then a receivership order may not be made. In addition, if the order is made and the SPC subsequently commences the winding up process, then the receivership order will cease to have effect.

Most importantly, a receivership order may in certain contexts, provide an alternative route to enforcement for some creditors. These creditors are typically those whose interests are protected under some form of security instrument. In this scenario, the creditor will have ability to enforce its rights under the security instrument if the debtor defaults. In this case, there is no supervision of the receiver by the court and the receiver will owe its primary duties to the creditor under the security instrument. |

**Commented [BT16]:** Good. 5 marks

### 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) As a partly secured creditor, since S & C has defaulted on its loan obligations, Sparrow will be able to take enforcement steps against S & C.

Preliminarily, Sparrow will need to consider whether there are any triggers to enforcement on default, in its security instrument with S & C. If that security instrument specifically provides for the appointment of a receiver over S & C's charged assets (i.e. the 4 boats), and assuming that one of the powers of a receiver in that charge instrument is the power of sale, then Sparrow will have the option of appointing a receiver out of court pursuant to its rights as contained in the security instrument. The receiver's appointment however will only be in relation to the charged assets, being the 4 boats and the sole purpose of the receiver in this scenario will be to realise the value of the 4 boats with the intention of repaying Sparrow the money owed in relation to the secured portion of the loan.

Commented [BT17]: 1 mark

In this scenario, as an unsecured creditor of up to \$120 million, Sparrow can either apply to wind up S & C, where it will claim in the liquidation alongside other unsecured creditors for the balance of its loan, or it can apply to put the company into provisional liquidation with the intention of obtaining a moratorium to stay ongoing proceedings and prevent the commencement of proceedings against the S & C with the purpose of allowing S & C some time to restructure its debt and thereby recover from its insolvency.

Commented [BT18]: 1 mark

As petitioning creditor, once provisional liquidators are appointed, then their role will be to seek to compromise S & C's debt with Sparrow, Roger Jolly and any other unsecured creditors. In applying for the company's provisional liquidation, Sparrow will also need to notify the court of its intention to seek a scheme of arrangement and will need to use the early signs of an upturn in tourism in support of its application.

- (b) As an unsecured creditor, Roger Jolly can apply to wind up S & C (i.e. full blown liquidation). If this is the route it chooses, then it will claim in the liquidation as an unsecured creditor ranked *pari passu* with all other unsecured creditors.

Alternatively, Roger Jolly can like Sparrow, apply to put the company into provisional liquidation with the intention of obtaining a moratorium to stay ongoing proceedings and prevent the commencement of proceedings against the S & C with the purpose of allowing S & C some time to restructure its debt and thereby recover from its insolvency.

As in the scenario with Sparrow above, Roger Jolly will need to notify the court (if it seeks provisional liquidation) of its intention to seek a scheme of arrangement and will need to use the early signs of an upturn in tourism in support of its application.

- (c) An unpaid employee cannot take an action against S & C per se – they will have to rely on the company being put into liquidation by a creditor for recovery of any unpaid salary or wages. If S & C is placed into liquidation, then the sums due to employees will be a preferential debt ranked *pari passu* with other preferential debts which comprise taxes due to the Cayman Islands government; sums due to depositors (if the debtor is a bank); and unsecured debts which are not subject to subordination agreements.

- (d) As a Cayman Islands registered company, the Grand Court of the Cayman Islands will have jurisdiction over S & C pursuant to section 91 of the Companies Act.

- (e) There is no legal framework in the Cayman Islands by which S & C can seek to restructure its debt. However, if a restructuring exercise is pursued in the Cayman Islands, the Grand Court will have jurisdiction over those proceedings if they are a part of the court process i.e. they are sought after the obtaining of an order for provisional liquidation.

- (f) In a "light touch" provisional liquidation, the Rackham family, as S & C's existing management is allowed to remain in control of the company. This however will be subject to the supervision of both the Grand Court and the provisional liquidator. If the liquidation is not a "light touch" liquidation, then the Rackham family will not be able to remain in control of S & C.

- (g) In considering a restructuring, the Grand Court will be expecting evidence of positive consensual negotiations between the creditors and the company before any application before the court.

\* End of Assessment \*

**Commented [BT19]:** .5 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\$0m as part of the official liquidation.

**Commented [BT20]:** 1 mark. 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 [BT21]:** 1 mark.

**Commented [BT22]:** 0 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 [BT23]:** 1 mark

**Commented [BT24]:** 0 marks.

1. Meeting 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 [BT25]:** Total marks for assessment - 35.5/50