



**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]: 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]:** 10/10 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?

Answer:

Creditor can register its security over real estate, ship, aircraft, motor vehicles and intellectual property through the Cayman Islands centrally maintained ownership registers. Once the mortgage or charge is registered, a third party purchaser of those charged assets will be deemed to have notice of any such interest and will acquire the assets subject to the secured creditor's interest. Some charges such as fixed charge, the debtor company cannot dispose the secured assets without the creditor's consent. When a winding-up order was made to the debtor company, the secured creditor is entitled to enforce the security without the leave of the Court and without the reference to liquidator.

Although there is no public security register for other assets in the Cayman Islands, section 54 of the Companies Act requires security interests be entered in the register of mortgages and charges of the debtor company. By registering the security interest in the company's mortgages and charges, though not creating a priority, it still put third parties on notice of the existence of security, preventing a third party from purchasing the assets.

**Commented [BT12]:** Nearly but not quite. 2 1/2 marks. The candidate may wish to re-read the Study Guide to reinforce their understanding of the effect of the Register of Mortgages and Charges.

**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?

Answer:

Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 were introduced to provide procedures to recognise a foreign representative and allow them to seek assistance of the Grand Court. The Grand Court can provide ancillary relief accordingly.

In determining whether to make any ancillary relief in favour of the foreign representative, the Grand Court will best assure it is an economic and expeditious administration of the debtor's estate and:

1. the just treatment of all holders of claims, both local and foreign, in accordance with established principles of natural justice;
2. the protection of claim holders in Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings;
3. the prevention of preferential or fraudulent dispositions of property in the debtor's estate;
4. the distribution of the estate among creditors substantially in accordance with the statutory order of priority;
5. the recognition and enforcement of security interests created by the debtor;
6. the non-enforcement of foreign taxes, fines and penalties;
7. the mutual recognition and cooperation concerning legal decisions.

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:

The Foreign Judgment Reciprocal Enforcement Act (1996 Revision) provided a statutory scheme for recognition and enforcement of foreign judgments in circumstances where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgments. However, this Act only extends to final monetary judgments from the Superior Courts of Australia so far.

The enforcement of foreign judgments is usually achieved by commencing a new action in Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation.

The requirements for enforcing a foreign judgment at common law are:

1. the judgement is final
2. the foreign court had jurisdiction over the debtor
3. the foreign judgment was not obtained by fraud
4. the foreign judgment is not contrary to public policy of the Cayman Islands
5. the foreign judgment was not obtained contrary to the rules of natural justice.

Commented [BT14]: 3 marks

Domestic enforcement remedies of Cayman Islands are available once a local judgment is obtained.

**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.

Answer:

The Companies Act does not have a prohibition on insolvent trading, the directors can however be made personally liable to the company for losses which they cause to the company if they act in breach of fiduciary duty to act in the best interests of the company.

Section 147 of the Companies Act also rules that if the business of a company was carried on with intent to defraud creditors, or for any fraudulent purpose, the liquidator may apply for an order requiring any persons who were knowingly parties, to such conduct to make such contributions to the company's assets as the Court thinks proper.

In case of property disposition after the deemed commencement of winding-up (i.e. the date when petition was filed), by section 99 of the Companies Act, such disposition will be void unless validated by the Grand Court. The liquidator is entitled to apply for relief to require repayment of funds or return of disposed assets.

The liquidator may apply to the Grand Court to order to return of the disposed assets from creditor if there was a voidable preference under section 145 of the Companies Act. A voidable preference is a repayment to creditor that occurs in 6 months before the deemed commencement of winding-up and at that time the company is insolvent; and with a dominant intention of the directors to give such creditor a preference over the other creditors. In particular, a disposition made to a related party of the company such as repaying a director's loan will be deemed to have been made with a view to giving a preference.

Lastly, if the company disposed an asset at undervalue and with the intention of wiffully defeating an obligation owed to a creditor, such transaction is voidable on application of the liquidator under section 146 of the Companies Act. Such application must be brought within 6 years of the disposal.

**Commented [BT15]:** Good. 7 marks. Additional reference to case law (eg Prospect Properties) and statute (e.g section 135) would have resulted in extra marks



**Question 3.2 [maximum 6 marks]**

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

Answer:

Although receivership is not explicitly mentioned in the Companies Act and Companies Winding-up Rules, the Grand Court Rules states that receivers may be appointed by the Court for collecting money or to carry out some other act such as for execution of a contract or a document of title.

Receivers can also be appointed by creditors without court involvement pursuant to rights in a security instrument. The receiver will act under the powers set out in the charge document, realise the value of the charged assets and repay the creditor the amount of unpaid debt.

Another specific scenario in Cayman Islands is when the assets of a Segregated Portfolio Company attributable to a particular portfolio of the company are likely to be insufficient to discharge the claims of creditors in respect of that portfolio, the Grand Court may make a receivership order. The receiver will then manage the business and assets attributable to that portfolio by relieving the directors of their function and powers for the purpose of closing down the business and distribution of assets of that portfolio to respective creditors.

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?

Answer:

- (a) What action can Sparrow take to protect its interests?

Sparrow as a secured creditor can appoint a receiver, if the charging document specifically provides for it, to take control of the 4 party boats.

Moreover, as the amount of debts exceeds the value of the 4 party boats, Sparrow may file a petition with the Grand Court to wind up S & C for the unsecured sum (over KYD 100) given that S & C is unable to pay the debts. 21 days after serving a demand to S & C, if the sum remains in default, Sparrow is eligible to file a petition against S & C.

- (b) What action can Roger Jolly take to protect its interests?

Roger Jolly's award was ruled at ICC sitting in London. However, the arbitration award is not a judgment final. In order to take enforcement in Cayman Islands, Roger Jolly should obtain a judgment final in London based on the arbitration award. He may then commence a proceeding in Cayman Islands to enforce of foreign judgments as an unsatisfied debt. Full range of domestic enforcement remedies are available subsequent to obtaining the enforcement judgment in Cayman Islands.

- (c) What action can the unpaid employees take against S & C?

The employees can file a petition against S & C to wind up the company as a creditor. Given that S & C cannot repay the unpaid wages exceeding KYD 100 21 days after the demand requiring S & C to do, S & C is deemed to be unable to pay its debts and the Grand Court may grant a winding-up order with this ground.

Sums due to employees during 4 months immediately preceding the commencement of winding-up is a preferred debts under section 141 of the Companies Act. They get priority to be paid to all other ordinary debts. Moreover, they are given a first charge on distrained goods or effects of S & C by the landlord within 3 months preceding the date of the winding-up order under section 141.

**Commented [BT17]:** Pretty good answer overall, if a little short. 1.5 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 and without leave of the court (s.142). Also, that S&C cannot pay its debts (s.92 and 93) such that Sparrow has standing as an unsecured creditor to petition to wind up S&C. Sparrow 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\$0m as part of the official liquidation.

**Commented [BT19]:** 2 marks.

(d) Does the Cayman Islands Court have jurisdiction over S & C?

S & C is a registered company in Cayman Island. The Cayman Islands Court has jurisdiction over it accordingly.

Commented [BT20]: 1 mark.

(e) Is there a legal route via which S & C can protect itself and seek to restructure?

S & C can commence scheme proceedings under section 86 of the Companies Act. By obtaining an agreement to compromise or arrangement from a majority in number representing at least 75% in value of the creditors and the sanction from the court, S & C can cram down the creditors.

S & C may apply for a provisional liquidation under section 104(3) of the Companies Act with the Grand Court in order to getting a protection from an automatic stay while the scheme arrangement is being worked out.

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.

(f) Following on from (e) above, can the Rackham family continue play a part in running S & C during any restructuring process?

If no provisional liquidation is applied, Rackham family will continue the management of S & P.

If provisional liquidation is applied, as determined by the Grand Court, Rackham family may be allowed to continue in control of S & C subject to supervision of the provisional liquidator and the Grant Court.

Commented [BT22]: 1 mark

(g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?

Before approving proposed restructuring, the Grand Court will be concerned with

1. compliance with the convening orders,
2. whether the majority creditors fairly represent the class of creditors,
3. whether the arrangement might be reasonable approved by an intelligent, honest member of the class of creditors convened, acting in his own interest,
4. whether there is any dissentient creditor to oppose the arrangement and what is their ground.

Commented [BT23]: 2.5 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.

**\* End of Assessment \***

**43/50**