



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**.

Commented [DB1]: If you don't do this I have to. Please read and follow the instructions!!

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 [BT2]: 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 [BT3]: 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 [BT4]: 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 [BT5]: 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 [BT6]: 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 [BT7]: 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 [BT8]: 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 [BT9]: 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 [BT10]: 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.

None of the above – it is a majority in number (so more than 50%) of 75% in value of the creditors or class of creditors, or members of class of members **who are present and voting (either in person or by proxy) at the scheme meeting**. The bold part is missing from the above.

Commented [BT11]: 1 mark.

Commented [BT12]: 10/10

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?

The Cayman Islands has an ownership register for real estate, ships, aircraft, vehicles and IP, where mortgages and charges can be registered against the asset. The effect of this is that any third-party purchasers will be deemed to have notice of the interest and will therefore acquire it subject to the interest.

Commented [BT13]: Correct but reference to the Register of Mortgages is necessary for full marks. 2 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?

The Cayman Islands has not adopted the UNCITRAL Model Law.

However, the Cayman Islands still regularly recognises and assists foreign bankruptcy proceedings. Part XVII of the Companies Act provides for international co-operation in insolvency proceedings. This allows the Grand Court of the Cayman Islands to provide ancillary relief to foreign representatives who have been appointed to a "foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established". The relief that can be provided includes:

- Recognition of the right of the foreign representative to act in the Cayman Islands on behalf of the debtor;
- Enjoining the commencement or staying proceedings against the debtor;
- Staying the enforcement of a judgment against the debtor;
- Requiring a person with information about the affairs of the debtor to submit to an examination and/or produce documents;
- Ordering the turnover of the debtor's assets to the foreign representative.

Commented [BT14]: 2 marks. The examiner was looking for the candidate to make reference to s. 242 and the statutory test therein for full marks.

Question 2.3 [maximum 3 marks]

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

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for the recognition of foreign judgments by the Governor of the Cayman Islands. The Governor is empowered to make an order recognising a foreign judgment where the country the judgment originates from provides reciprocity in relation to enforcing Cayman Islands judgment and the judgment is from a superior court, final (notwithstanding that an appeal could be made), a money judgment, and made after 1996. The Governor can revoke an order made under this law.

Commented [BT15]: But this is limited to Australia. What about the common law (and the 5 mandatory requirements)? 1 mark.

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.

With sanction from the court, a liquidator (on behalf of the company) could pursue the former directors for breaching fiduciary duties held to the company while it was solvent and/or the creditors while it was insolvent. If successful, this could result in a monetary award made against the directors. The liquidators could then (on behalf of the company) enforce payment of that award. The shareholders could also sue the directors for breaching their fiduciary duties directly (or in some limited circumstances, by way of a derivative claim on behalf of the company).

Claw back options include:

Section 145 of the Companies Act, under which the court can void a disposal of company property that occurs in the six months prior to the commencement of the company's liquidation when it was unable to pay its debts and with dominant intention was to give the creditor paid a preference (i.e. putting them in better position that they otherwise would have been) over other creditors.

Section 146 of the Companies Act, under which the court can void (after application by the liquidator) a transaction where an asset of the company in liquidation is disposed of at an undervalue and with the intention of wilfully defeating an obligation owed to a creditor.

Commented [BT16]: 5 marks. An OK answer but the candidate was being given an opportunity to demonstrate knowledge of case law and other sections of the Act as well (s. 99, 135, 147)

Question 3.2 [maximum 6 marks]

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

Receivers do have a role to play in Cayman Islands insolvencies and can be appointed in the Cayman Islands. Their appointment in relation to companies is not explicitly referred to the

Companies Act of CWRs, but the Grand Court Rules do provide for the appointment of receivers to collect money or carry out some other act.

The Companies Act does explicitly provide for the appointment of receivers in relation to segregated portfolios of Cayman Islands segregated portfolio companies (SPCs). An SPC is a single legal entity with separate segregated portfolios, where the assets of each portfolio are ring fenced from those of the other portfolios.

Part XIV provides a framework for the appointment of receivers to SPCs. The Grand Court can appoint a receiver over a segregated portfolio when the Grand Court is satisfied that the segregated portfolio's assets are likely to be insufficient to discharge the claims of creditors against that portfolio. The receiver then carries out a role akin to that of a liquidator in relation to the portfolio, while the other portfolios can continue as usual.

Commented [BT17]: Good. 4.5 marks. Don't forget contractual appointment to protect secured creditors.

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?

Sparrow has multiple options. It could appoint receivers over the boats it has security over, could petition the grand court to wind up the company or to appoint provisional liquidators.

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

Commented [BT18]: Correct but lacking in any sort of reasoning or detail. 1 mark. 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.

Roger Jolly should first seek to have the ICC decision recognised. This is possible under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which will extend to the Cayman Islands via the UK.

It can then seek to enforce the ICC decision. If/when payment is not made, it could petition the Grand Court to wind up S & C or to appoint provisional liquidators.

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

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

Yes, because S & C registered in the Cayman Islands (see section 91 of the Companies Act).

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

Yes, S & C could apply to have provisional liquidators (PLs) appointed. The Court may order that the family continue to run S & C, subject to oversight from the PLs/Court. The court could empower the PLs to attempt to restructure S & C's debts, through (among other things) the settlement of claims or a scheme of arrangement. This would impose a moratorium on claims against S & C, protecting it from claims while the PLs attempt to restructure its debts.

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

This would depend on the restructuring process and the order the court makes. If a voluntary or official liquidator is appointed, the powers of any of the Rackham family who are directors will cease (except for to appeal the appointment). If a PLs is appointed, the level of control given to the board is at the court's discretion. The Court can remove all power, but is more likely to leave the board in control, subject to oversight from the PLs/Court.

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

The relevant legislation (section 86 of the Companies Act) does not provide a test the court must apply when considering whether or not to sanction a scheme of arrangement.

The court usually considers that the stakeholders are the best judge of their own commercial interests, so will typically sanction a scheme that has the requisite support, unless the court considers that the terms of the scheme are not fair such that an intelligent and honest creditor, being a member of the class concerned and acting in its own interests, would not reasonably vote in favour of the scheme.

Commented [BT19]: 1.5 marks. 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 [BT20]: 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 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]: 1.5 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 [BT23]: 1 mark

Commented [BT24]: 1 mark. 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 ***

33/50