



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

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 does have an ownership register for real estate, ships, aircraft, motor vehicles and intellectual property. These registers are centrally maintained, and mortgages and charges can be registered. A third-party purchaser will be deemed to have notice of any such interest and will therefore acquire the asset subject to the secured creditor's interest.

There is no public security registration scheme for other assets, therefore a creditor must take adequate steps to ensure it has sufficient control over an asset to prevent a third party from purchasing it.

Section 54 of the Companies Act requires that security interests be entered in the register of mortgages and charges of the debtor company. The register must be maintained by the company at its registered office. Failure of a company to update the register of mortgages and charges does not, in and of itself, invalidate any security interests.

While registering a security interest in the company's register of mortgages and charges does not create priority, the register is open for inspection by any member of the company or a creditor, therefore registration does put third parties on notice of the existence of a 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?

The Grand Court's powers to make orders in support of foreign insolvency proceedings are provided for in Part XVII of the Companies Act.

The Grand Court can provide the following forms of ancillary relief (section 241):

1. Recognising the right of a foreign representative to act in the Cayman Islands on behalf of, or in the name of, a debtor;
2. Enjoining the commencement or staying the continuation of legal proceedings against a debtor;

3. Staying the enforcement of any judgment against a debtor;
4. Requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and to produce documents to its foreign representative; and
5. Ordering the hand-over to a foreign representative of any property belonging to the debtor.

The Cayman Islands has not implemented the UNCITRAL Model Law, although regard is had to the principles. The criteria upon which the Court's discretion will be exercised is set out at section 242 of the Companies Act. In determining whether to make the ancillary orders referred to above, the Grand Court is guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with:

1. The just treatment of all holders of claims, wherever they are domiciled, in accordance with established principles of natural justice;
2. The protection of claim holders in the 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. Comity (i.e. 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.

The Grand Court adopts a cooperative approach to cross-border cases in order to ensure an effective winding up and the protection of the interests of its creditors, wherever they may be situated.

The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of judgments, neither has the UK extended its ratification of any such treaties to the Cayman Islands.

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) does provide 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. To date, however, this Act has only been extended to judgments from the Superior Courts of Australia.

Given the limited application of that Act, the enforcement of foreign judgments is usually achieved by commencing a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation. Such actions are conducted under the regular procedural regime for litigation in the Cayman Islands, the Grand Court Rules.

Money and non-money judgments are enforceable at common law.

Commented [BT14]: 2 marks. Reference to the common law mandatory requirements was necessary to earn full 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.

There is no statutory obligation to file for insolvency and the Companies Act does not contain a prohibition on wrongful trading (i.e. continuing to trade whilst insolvent).

Directors can, however, be made personally liable to the company for any losses which they cause to the company if they act in breach of their fiduciary duty to act in the best interests of the company. In the case of *Prospect Properties v McNeill*, the Grand Court held that where a company is insolvent, the directors' duty to act in the best interests of the company requires them to have regard to the interests of its creditors. It is in the interests of the creditors to be paid and it is in the interest of the company to be safeguarded against being put in a position where it is unable to pay.

Where a company is in official liquidation, the official liquidator can pursue claims against the directors on behalf of the company (in the company's name) for breach of their fiduciary duty.

With regard to payments that should not have been made, section 145 of the Companies Act provides that any payment or disposal of property to a creditor constitutes a voidable preference if:

1. 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
2. The dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

Importantly, a disposition made to a “related party” of the company (such as a person that has the ability to control the company or exercise significant influence) will be deemed to have been made with a view to giving a preference.

A disposition that is set aside as a preference is void, and the liquidator may apply to the Grand Court to order the creditor to return the asset and prove in the liquidation for the amount of its claim.

Further, section 147 of the Companies Act deals with fraudulent trading. If the business of a company was carried on with intent to defraud creditors, or for any fraudulent purpose, a 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.

Section 99 of the Companies Act states that any dispositions of a company's property made after the deemed commencement of the winding-up will be void in the event that a winding-up order is subsequently made (unless validated by the Grand Court). The liquidator is entitled to apply for appropriate relief to require the repayment of the funds or the return of the asset.

Commented [BT15]: 7 marks. Could also have mentioned other sections (e.g. 146 and 135 etc)

Question 3.2 [maximum 6 marks]

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

Receivers may be appointed in the Cayman Islands albeit they are not explicitly mentioned in the statutory provisions dealing specifically with insolvency, i.e. the Companies Act and the Companies Winding Up Rules 2018. However, the Grand Court Rules (GCR) do contemplate

that receivers may be appointed by the Court for the purposes of collecting money (such as rents) or to carry out some other act (such as the execution of a contract or a document of title). Order 45 of the GCR states that receivers may be appointed to enforce court orders for the payments of money. Order 51 of the GCR also provides for the appointment of receivers by way of equitable execution.

Receivers and receivership orders are, however, specifically provided for by statute in respect of a particular type of Cayman Islands legal entity, i.e. the Segregated Portfolio Company (SPC). An SPC is a regular company which remains a single entity but is permitted to create separate portfolios for different assets and liabilities, which are ring-fenced from each other. If the Grant Court is satisfied that the SPC's assets attributable to a particular portfolio of the company are likely to be insufficient to discharge the claims of creditors in respect of that portfolio, it may make a receivership order in respect of that portfolio. The role is analogous to a liquidator.

Secured creditors may also appoint receivers to enforce security rights. Receivership is essentially a contractual self-help remedy only available to secured creditors on the terms set out in the relevant security document. It is a method by which a secured creditor can enforce its security, realise the secured property and obtain repayment (full or partial) of the debt owed. There are no specific statutory provisions determining how a receiver should be appointed, and the appointment of a receiver must be made in accordance with the terms of the security document in order to be valid.

Receivers therefore do have a role to play in a Cayman Islands insolvency scenario or where a company is facing financial difficulties. |

Commented [BT16]: Good. 5 points.

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) What action can Sparrow take to protect its interests?

Sparrow is a secured creditor. 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. This appears to be a legal mortgage, therefore once the debtor defaults, as S&C has done, the secured creditor is permitted to take possession and exercise its power of sale with respect to the property.

Sparrow therefore has security over assets of S&C and is entitled to enforce its security (even if S&C is placed into official or provisional liquidation). Sparrow may enforce its security without the leave of the Grand Court and without reference to any liquidator that may be appointed over S&C.

A secured creditor whose debt is more than the value of his security, as appears to be the case with Sparrow, may prove in any liquidation for the unsecured balance. In such circumstances, the proof of debt submitted by the secured creditor must state particulars of the security and the value which he or she places on the security.

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

Roger Jolly has a ruling from the ICC in London in its favour that S&C must pay damages of USD 50 million. Roger Jolly may seek enforcement of that judgment at common law in the Cayman Islands by commencing a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation.

Roger Jolly will have to show that the foreign judgment is final, that the foreign court had jurisdiction over S&C, that the judgment was not obtained by fraud, is not contrary to the public policy of the Cayman Islands and was not obtained contrary to the rules of natural justice.

Commented [BT17]: Good. 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 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.

Once a local judgment has been obtained, the full range of domestic enforcement remedies are available to Roger Jolly.

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

A company may be wound up and put into official liquidation by the court on a petition presented by a creditor. Unpaid employees are creditors of S&C.

The order of priorities in an official liquidation begins with liquidation expenses, followed by preferential debts. Preferential debts include sums due to employees. Pursuant to section 141 of the Companies Act, sums due to employees (along with a limited number of other debts) are paid in priority to all other debts.

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

The Grand Court has jurisdiction to make winding up orders in respect of S&C because it is a company registered in the Cayman Islands. Although it may have been incorporated elsewhere, the fact it is registered in the Cayman Islands gives the Grand Court jurisdiction.

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

The best option available to S&C is to have provisional liquidators appointed in conjunction with a scheme of arrangement under section 86.

Under Section 104(3) of the Companies Act, S&C itself may make an ex parte application for provisional liquidation on the grounds that it is unable to pay its debts and it intended to present a compromise or arrangement to its creditors.

Once a provisional liquidator is appointed, no proceedings or action may be commenced or continued against S&C without the leave of the Grand Court, thereby allowing the company some breathing space to negotiate a scheme of arrangement.

A scheme of arrangement is a court approved compromise or arrangement entered into between a company and its creditors or members or any class of them. Such a scheme may be useful to S&C because it can allow for the restructuring of liabilities.

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

If S&C remains out of liquidation, the management (i.e. the Rackham family) can stay in control of the company. If the scheme is placed into provisional liquidation – which is important to allow S&C some breathing room from creditors – the management may remain in control subject to oversight by the provisional liquidators. This is known as a “light touch” provisional liquidation. In other cases however, the provisional liquidator’s powers replace those of the directors. IT will depend on the facts of each case. Given that S&C seems to be in a great deal of financial difficulty, it is unlikely that the management will be permitted to remain in control.

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

Commented [BT18]: 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 [BT19]: 2 marks

Commented [BT20]: 1 mark.

Commented [BT21]: 3 marks

Commented [BT22]: 1 mark

If it has the necessary creditor support, any compromise or arrangement must still be sanctioned by the Court before it is binding on all the creditors (or the class of creditors or members), the company and its contributories.

The Court will be concerned with compliance with the convening orders, whether the majority fairly represent the class, whether the arrangement (having regard to the alternatives) is such that an intelligent, honest member of the class convened, acting in his own interest, might reasonably approve it.

*** End of Assessment ***

43.5/50

Commented [BT23]: 2 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.