



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 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?

A creditor may register its security interest over real estate, ships, aircrafts, motor vehicles or intellectual property. Cayman Islands have central registers recording ownerships of these asset classes. Secured creditors can register their security interests on the relevant central registers. The effect of registration is that any third party purchaser of the relevant asset is deemed to have notice of the registered security interest, and therefore acquires the asset subject to the security interest.

Commented [BT12]: Correct but reference to the debtors Register of Mortgages and Charges was 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 source of the Grand Court's power to assist foreign bankruptcy proceedings is Part XVII of the Companies Act. The power can only be exercised upon the application of a foreign representative (which means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding) (section 241 of the Companies Act). The power is discretionary. In considering whether to exercise the power, the Court will be guided by matter 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 Cayman 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 of the Companies Act; (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 (section 242 of the Companies Act).

Commented [BT13]: 4 marks

Question 2.3 [maximum 3 marks]

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

Foreign judgment may be recognised in the Cayman Islands by registration under the Foreign Judgment Reciprocal Enforcement Act (1996 Revision) or by common law recognition. Currently the Foreign Judgment Reciprocal Enforcement Act only applies to judgment from the Superior Courts of Australia and its external territories.

For registration under the Foreign Judgment Reciprocal Enforcement Act, the judgment must be (i) a monetary judgment, (ii) from one of the Superior Courts of Australia and its external territories, (iii) final and conclusive, (iv) given after the Act came into force. Application for recognition and enforcement must be made within six years after the date of the judgment. The registration will be set aside if the foreign court had no jurisdiction in the case, or the debtor did not receive notice of the foreign proceedings, or the judgment was obtained by fraud, or the enforcement would be contrary to the public policy of the Cayman Islands.

For common law recognition, the judgment must be final and conclusive and the foreign court had jurisdiction over the debtor. The Court will not recognise or enforce the foreign judgment if it was obtained by fraud, or its recognition or enforcement would be contrary to public policy, or that it was obtained in proceedings which were contrary to natural or substantial justice.

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.

Directors of Cayman Islands companies owe general fiduciary duties to act in good faith in the best interests of the company, to exercise their powers for a proper purpose (and not any collateral or improper purpose) and to act diligently with due skill and care. When a company is insolvent or on the 'verge' of insolvency, the duty of directors to act in the best interests of the company requires them to have regard to the interests of its general body of creditors, to protect the interests of all creditors and to minimise potential loss as the risk of insolvency escalates. If directors breached these duties, liquidators may pursue them and require them to compensate the company for the loss caused by their breach.

If the directors have effected transactions which are voidable under the Companies Act, official liquidators may seek to claw back payments so made. The voidable transactions under the Companies Act include:

- If a payment or disposal of property to a creditor was made with the dominant intention to give that creditor a preference over other creditor, and within six months before the commencement of the company's liquidation (usually presentation of the winding up petition), while the company was unable to pay its debts as they fall due, the payment / disposal is invalid. Payments made to a related party of the company are deemed to have been made with a view to giving such creditor a preference. (section 145 of the Companies Act)
- If a disposal of property was made undervalue with the intention of wilfully defeating an obligation owed to a creditor, the disposal is voidable on application of the liquidator. (section 146 of the Companies Act)

Furthermore, if the business of a company was carried on with intent to defraud creditors, or for any fraudulent purposes, the liquidator may apply for an order requiring any persons who

were knowingly parties to such conduct to make contributions to the company's assets. (section 47 of the Companies Act)

Commented [BT15]: Decent answer. 6 1/2 marks. Might also have mentioned case law (Prospect Properties) and other statutory provisions (s.99, 135)

Question 3.2 [maximum 6 marks]

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

Receivership provides an alternative to winding up. For example, secured creditors may enforce their security by appointing receivers in accordance with the terms set out in the security document without reference to the Court. The process is usually quicker than seeking winding up of the company. Typically, the security document will give the receivers power to take possession of the secured asset. This will help the secured creditors to take control of the secured asset quickly so as to prevent dissipation.

Commented [BT16]: Good. 5 marks.

The Cayman Court may appoint a receiver by way of equitable execution. A judgment creditor may use this way to seek to enforce its debt. For example, instead of seeking to wind up the judgment debtor, a judgment creditor may seek to appoint a receiver to manage the income of judgment debtor. If the judgment debtor has limited assets, but receives income from discretionary trust, appointment of receivers may offer a better recovery.

Receivership is important in the winding down of segregated portfolio companies (SPCs). The Cayman Court may appoint receiver to wind down one or more of the portfolios without having to wind up the SPC if the Court is satisfied that the segregated portfolio of the SPC is unlikely to be sufficient to discharged the claims of the creditors in respect of that portfolio. The purpose of the receivership order is to orderly close down the business of the segregated portfolio and the distribution of the segregated portfolio assets. The appointment of receiver to a portfolio affords an automatic stay on proceedings against the SPC. Furthermore, during the period of the receivership, the receivers relieves the directors of their functions and powers in respect of the business of the segregated portfolio.

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 may enforce its securities even after the company is placed into liquidation. It may do so without leave of the Court and without reference to the company's liquidator. Sparrow may take possession of the boat and exercise its power of sale or appoint a receiver to realise the property.

Furthermore, Sparrow, as a secured creditor whose debt is unpaid, is entitled to petition for S&C to be wound up (*In the Matter of G3 Exploration Limited*, Unreported, FSD 229 of 2019, 24 July 2020). Where its debt is more than the value of its security, it may prove in liquidation for the balance as an unsecured debt.

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

Roger Jolly won an US\$ 50 million ICC award. As the award has not been satisfied. Roger Jolly is a creditor of S&C for the unsatisfied award. As an unsecured creditor, it is entitled to petition for S&C to be wound up.

The ICC award is a New York Convention award, it may be enforced in the Cayman Islands in the same manner as a domestic arbitral award made in the Cayman Islands. Accordingly, Roger Jolly may also enforce the award through garnishee proceedings, charging order, appointment of receivers, and etc.

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

Unpaid employees are creditors of the company, and therefore are entitled to petition to wind up S&C. Unpaid employees are preferential creditors under the Cayman Islands law, and are entitled to be paid in priority to the claims of any unsecured creditors in liquidation. So they will have better chance of recovery than unsecured creditors in liquidation.

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

Because S&C is registered in the Cayman Islands, Cayman Islands Court has jurisdiction to make winding up orders in respect of S&C under section 91(b) of the Companies Act.

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.

Commented [BT18]: 2 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.

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

Under the Cayman Islands law, if the Cayman Islands Court is satisfied that a company is unable to pay its debt, a winding up will follow unless there are some special reasons why it should not. So, if S&C is unable to pay its debts as they fall due (assuming the debts are not in dispute), the only possible way to protect S&C and to seek restructuring is by an appointment of provisional liquidators under section 104(3) of the Companies Act, which allows a company to apply for an appointment of provisional liquidators after the presentation of a winding up petition on the grounds that (i) the company is or is likely to be insolvent and (ii) the company intends to present a compromise or arrangement to its creditors. To do so, S&C will need to petition to wind up itself and at the same time apply to appoint provisional liquidators for restructuring.

Commented [BT21]: 3 marks

Once provisional liquidators are appointed, no action or proceeding may be commenced or continued against the company without leave of the Cayman Islands Court. So provisional liquidation will allow the company an opportunity to restructure their liabilities (for example by a scheme of arrangement).

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

Provisional liquidation is a flexible procedure where the Court may give the powers it considers proper to achieve the purposes of provisional liquidators. The Court may give the provisional liquidators full powers to take control of the company (and whereby remove all of the directors' powers) if necessary, or to appoint provisional liquidators on a 'light touch' basis where the directors retain day-to-day control of the company subject to the oversight of the provisional liquidators.

Commented [BT22]: 1 mark

In cases of company's application to appoint provisional liquidators to facilitate restructuring, where there is no allegation of wrong doing by the directors, the Court often appoint provisional liquidators on a 'light touch' basis, where Rackham family may continue to manage the day to day running of the business during the restructuring process subject to the provisional liquidators' supervision.

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

Before the Caymans Islands Court exercise its jurisdiction to appoint provisional liquidators to facilitate restructuring, it must be satisfied that it is in the best interests of the creditors in the circumstances (*Fruit of the Loom* (Unreported, 30 October 2000)). The Court will take into consideration of the following factors:

- The express wishes of creditors.
- Whether the refinancing is likely to be more beneficial than a winding up order.
- Whether there is a real prospect of restructuring and the viability of the restructuring plan (if any).
- The nature of the creditors supporting or opposing the application, including whether they are secured or unsecured.
- The considered views of the board as to the best way forward.

Commented [BT23]: 1/2 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 ***

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