



**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]: Incorrect. Answer is D.

### Question 1.10

Select the **correct answer**.

In order for a proposed scheme of arrangement to be approved:

- (a) 50% or more representing 75% or more in value of the creditors must agree.
- (b) 50% or more representing more than 75% of the creditors must agree.
- (c) More than 50% representing more than 75% of the creditors must agree.
- (d) More than 50% representing 75% or more in value of the creditors must agree.

**Commented [BT10]:** Correct. 1 mark.

**Commented [BT11]:** 9/10 for this section.

### QUESTION 2 (direct questions) [10 marks]

#### Question 2.1 [maximum 3 marks]

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

Where a security interest is created by a company and regardless of where the asset is located, it is possible (and necessary) under section 54 of the Companies Act to enter any security interest in the register of mortgages and charges of the company (which is maintained by the company at its registered office in the Cayman Islands).

Other than to enter particulars of any agreements entered into by a company creating security interests in its register of mortgages and charges, it is not necessary that any transaction documents creating a security interest be filed, recorded or enrolled with any governmental, regulatory or judicial authority in the Cayman Islands in order to ensure the validity of the security interest.

Although generally a private document, the register of mortgages and charges is open to inspection by any creditor or member of the company at the company's registered office at all reasonable times, although it is not a document that is open to public inspection.

**Commented [BT12]:** Good answer on the ROM&C but reference to the centrally maintained registers for vessels, real estate (and the effect of registration therein) 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?

Part XVII of the Companies Act provides for the Grand Court to assist foreign bankruptcy proceedings. Foreign representatives must satisfy the Court that it is appropriate for the Court to exercise its discretion to provide the relief sought.

Under Section 241 (1) of the Companies Act, the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of-

- a. recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
- b. enjoining the commencement or staying the continuation of legal proceedings against a debtor;

**Commented [BT13]:** 4 marks.

- c. staying the enforcement of any judgment against a debtor;
- d. requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
- e. ordering the turnover to a foreign representative of any property belonging to a debtor.

Section 242 of the Companies Act defines when the Court's discretion shall be exercised under Section 241, which, generally is in matters which will best assure an economic and expeditious administration of the debtor's estate, and that is 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. (b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
- c. the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
- d. the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;
- e. the recognition and enforcement of security interests created by the debtor;
- f. the non-enforcement of foreign taxes, fines and penalties; and
- g. comity

### Question 2.3 [maximum 3 marks]

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

The Cayman Islands have not entered into any international treaties with regards to the recognition and enforcement of foreign judgements. Nor has any UK treaty or convention been extended to the Cayman Islands other than the New York Convention. The Cayman Islands is also not a signatory to the Hague Convention.

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) does provide a statutory provision for the recognition of foreign judgements subject to reciprocity being assured between the two jurisdictions but is largely restricted to Australia and its territories.

In all other cases, the recognition and enforcement of foreign judgments is generally recognised under common law, i.e. commencing an action in the Cayman Islands based on that judgement (as a judgement creditor).

**Commented [BT14]:** 2 marks. More detail (e.g. mandatory criteria at common law) needed 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.

A director is a fiduciary of the company. Directors may be liable for breach of fiduciary duties if the company continues to incur liabilities or make payments that should not have been made

while it is unable to pay its debts. However, in the Cayman Islands, a director is not exposed to personal liability merely because a company trades when insolvent, as this may be allowed under a provisional liquidation or “light touch” liquidation process as approved by the Court.

Yet, if a director has breached their fiduciary duty and caused further loss to the company, then a liquidator could bring a claim if payments were made if transactions are voidable or made at an undervalue with the intent to defraud creditors (Section 146 (2) of the Companies Act). The director may be personally liable for damages to the insolvent company.

If the liquidator successfully brings a claim, a director can be declared liable to “make such contributions, if any, to the company’s assets as the Court thinks proper” under Section 147 of the Companies Act, if indeed, it is found that such payments were made for any fraudulent purpose.

A creditor may also litigate for a voidable claim if it appears that payments were made by Directors for the company to other creditors, which were as the result of fraud (as per the case in Weaving where investors clawed back funds paid to Swedish Bank based on an internal fraud that had been perpetrated, even if the bank itself was external to the fraud), or if it was in preference to other creditors. This is not possible where a fraudulent payment to the benefit of other creditors is made as a result of fraud external to the company, for which it was inadvertently involved. |

**Commented [BT15]:** 6 marks. Candidate hits some key points but answer would have benefitted from more detail and reference to other case law and statutory provisions in the study guide.

### **Question 3.2 [maximum 6 marks]**

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

Whilst there are no explicit provisions in the Companies Act for the appointment of Receivers, their appointments are governed by the Grand Court Rules (30).

Receiverships can offer a valuable alternative to the standard methods of recovery arising under the formal insolvency regimes of the Cayman Islands and, in some instances, may be the more appropriate enforcement choice for secured creditors.

Receivers appointed pursuant to a court application by a judgment creditor are described as being appointed by way of “equitable execution” meaning that a receiver will be given the right to identify, investigate and recover the specified property over which the applicant proves to have any equitable interest to the satisfaction of the Grand Court. This may be of benefit to a creditor where the Receiver’s objectives may differ slightly to the Liquidator, i.e an expedited sale or valuation, or where the expertise of the Receiver may be directly relevant to the asset (eg valuation and execution of contracts), and that the costs are limited to that asset and not apportioned unfairly.

Receiverships are however governed by statute in relation to a Segregated Portfolio Company (SPC) which holds segregated portfolio’s (SP’s). Each SP’s assets and liabilities are segregated from the other SP’s in the company, and can have different shareholders and stakeholders to each other. If the Grand Court is of the opinion that a SP has insufficient assets to discharge its liabilities it may appoint a Receiver over that specific SP, the role being analogous to that of a Liquidator. The objective of the Receiver is to wind down in an orderly fashion the SP. However it should be noted that if the SPC itself is already in liquidation, then a Receiver cannot be appointed over a SP, as the Liquidator is in fact winding down the whole company. That said, it is possible for an additional liquidator to be appointed over an SP if the Grand Court is of the view that the Liquidator has a conflict of interest in dealing with the assets of a particular SP as compared to others within the company.



**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?

Answers:

- a) As long as Sparrow Bank has (as per section 54 of the Companies Act) entered its security interest in the four vessels on the company register (which is maintained by the company at its registered office in the Cayman Islands), then it is able to deal with those vessels (i.e. recover and dispose of the same) in order to satisfy c. US\$80mil of its loan. Sparrow Bank as a creditor with a fixed or floating charge over the vessels would have the right to take possession of the vessels (including the right of sale) when a specified event of default occurs (as per Section 142 of the Act). Although the legal title over the property is not transferred to the creditor. When a default occurs, the creditor can sell the charged property and use the proceeds to satisfy the amounts due to it from the debtor without reference to other creditors and regardless of whether S&C is subsequently liquidated.

However the remaining US\$120mil would need to be dealt with separately. In this regard, Sparrow could seek to wind up S&C, albeit its remaining US\$120mil would be classed as an unsecured debt, and any remaining assets in the company would be dealt with in priority order according pursuant to Section 140 of the Act, after taking into account secured creditors, to the following order of priority as follows:

- liquidation expenses including fees and costs incurred by the liquidator and their legal counsel.
- preferential debts, comprising certain sums due to or payable on behalf of employees; certain taxes due to the Cayman Islands government; and for certain Cayman Islands banks, certain sums due to depositors;
- unsecured debts which are not subject to subordination or deferral agreements (with contractually subordinated/deferred debts being paid in accordance with the subordination agreement);
- amounts due to preferred shareholders under the company's articles of association, provided that the rights of those shares are preferred to the rights of the shares referred to below;
- debts incurred by the company in respect of the redemption or purchase of its own shares (although it remains an open question whether such claims arising where the redemption or purchase took place before the liquidation commenced, rank ahead of or pari passu with such claims where the shares were due to be redeemed before the liquidation commenced but were not redeemed due to the company's default); and
- any surplus remaining after payment of the above amounts is returned to the shareholders of the company in accordance with its articles or any shareholders' agreement.

In light of the lack of funds to pay ongoing maintenance and operating costs, and the arbitration award made to the Roger Jolly, it is unlikely that there would be much remaining by way of assets for distribution.

- b) Roger Jolly would be able to seek enforcement of their arbitral award in Cayman Islands through The Foreign Arbitral Awards Enforcement Act (1997 Revision) (the FAAEA) gives domestic effect to the New York Convention in the Cayman Islands. They would seek to enforce the award through originating summons in the Cayman Islands Court, where it could seek a number of recovery options. However it would appear that S&C would not be able to satisfy this award in any event, and as such Roger Jolly may prefer to assist S&C with approving a restructuring program so as to avoid exacerbating any further losses.

**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]:** 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.

c) The employees of the firm would need to provide a proof of debt form to the liquidator regarding any unpaid amounts due to them. Employees would rank as preferential creditors, and above ordinary unsecured creditors.

d) The Grand Court does have jurisdiction over S&C as it is a Cayman Islands incorporated company. It is not clear from the above if COMI is in Cayman, it may be assumed to be.

e) S&C could seek to apply to the Court to restructure its debts and obligations to allow the company to rehabilitate and return to trading. There are two potential options available to it:

Seek a Scheme of Arrangement:

The Court may, on the application of S&C approve a scheme of arrangement, which is a court-supervised process which allows for the rights of creditors or members to be varied, by forcing the relevant non-consenting creditors and/or members into the compromise or arrangement.

A majority in number (i.e. more than 50%) representing 75% in value of the creditors or class of creditors, or members or class of members, as the case may be, must approve the Scheme prior to it returning to the Court for sanction.

This means that should any one class of creditors or members, reject the Scheme, the Scheme would be blocked from proceeding. There is currently no ability to 'cramdown' a dissenting class, so it would need all of the creditors approval.

Seek a Provisional Liquidation

If it is the case that not all creditors agree on a proposed scheme, an application for the appointment of a provisional liquidator may be made. A "light touch" provisional liquidation would allow the directors (or in this case the Rackam family) to continue running the business whereby the provisional liquidators enact the moratorium given to provisional liquidations, to restructure the debt and provide the necessary breathing space to do so.

f) Yes, as noted above, the Rackam family may be able to continue running the business, with the oversight of the liquidators.

**Commented [BT19]:** 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 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 [BT20]:** 1 mark.

**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.

**Commented [BT22]:** 1 mark

**Commented [BT23]:** g) 0 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 \***

**37.5 / 50**