



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

CAYMAN ISLANDS

This is the **summative (formal) assessment** for **Module 5C** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 5C. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment5C]**. An example would be something along the following lines: 202122-336.assessment5C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Select the **correct answer**.

Once a provisional liquidator is appointed:

- (a) No action may be commenced against the company without leave of the court.
- (b) No existing action may be continued against the company without permission of the provisional liquidator.
- (c) Legal proceedings may be commenced or continued against the company without leave of the court.
- (d) No action may be commenced against the company.

Commented [BT1]: Correct. 1 mark.

Question 1.2

Which of the following is **not** available in the Cayman Islands?

- (a) Appointment of a receiver.
- (b) Court-supervised liquidation.
- (c) Official liquidation.
- (d) Deed of Company Arrangement.

Commented [BT2]: Correct. 1 mark.

Question 1.3

Select the **correct answer**.

In a voluntary liquidation:

- (a) The company may cease trading where it is necessary and beneficial to the liquidation.
- (b) The company must cease trading except where it is necessary and beneficial to the liquidation.
- (c) The company must cease trading if it is necessary and beneficial to the liquidation.
- (d) The company may cease trading unless it is necessary and beneficial to the liquidation.

Commented [BT3]: Correct. 1 mark.

Question 1.4

Select the **correct answer**.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

- (a) A company incorporated in the Cayman Islands.
- (b) A company with property located in the Cayman Islands.
- (c) A company carrying on business in the Cayman Islands.
- (d) Any of the above.

Commented [BT4]: Correct. 1 mark.

Question 1.5

Select the **correct answer**.

In a provisional liquidation, the existing management:

- (a) Continues to be in control of the company.
- (b) Continues to be in control of the company subject to supervision by the court and the provisional liquidator.
- (c) May continue to be in control of the company subject to supervision by the provisional liquidator and the court.
- (d) Is not permitted to remain in control of the company.

Commented [BT5]: Correct. 1 mark.

Question 1.6

Select the **correct answer**.

When a winding up order has been made, a secured creditor:

- (a) May enforce their security with leave of the court.
- (b) May enforce their security with leave of the court provided the liquidator is on notice of the application.
- (c) May enforce their security without leave of the court.
- (d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.

Commented [BT6]: Correct. 1 mark.

Question 1.7

Select the **correct answer**.

Any payment or disposal of property to a creditor constitutes a voidable preference if:

- (a) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (b) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (c) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (d) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

Commented [BT7]: Correct. 1 mark.

Question 1.8

Which of the following **is not** a preferential debt ranking equally with the other four?

- (a) Sums due to company employees.
- (b) Taxes due to the Cayman Islands government.
- (c) Amounts due to preferred shareholders.
- (d) Sums due to depositors (if the company is a bank).
- (e) Unsecured debts which are not subject to subordination agreements.

Commented [BT8]: Correct. 1 mark.

Question 1.9

Select the **incorrect statement**.

A company may be wound up by the Grand Court if:

- (a) The company passes a special resolution requiring it to be wound up.
- (b) The company does not commence business within a year of incorporation.
- (c) The company is unable to pay its debts.
- (d) The board of directors decides it is "just and equitable" for the company to be wound up.
- (e) The company is carrying on regulated business in the Cayman Islands without a license.

Commented [BT9]: Correct. 1 mark.

Question 1.10

Select the **correct answer**.

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

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

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

Commented [BT10]: Correct. 1 mark.

Commented [BT11]: 10/10 for this section

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

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

- Yes, it is possible for a creditor to register its security over an asset in the Cayman Islands.
- In the Cayman Islands, there is an ownership register in which mortgages and charges can be registered for real estate, ships, aircraft, motor vehicles and intellectual property.
- When an asset is registered if purchased a third party purchaser will be deemed to have notice and be aware of these interests and will own the assets subject to the charge.
- These are the only assets that there is a register for other assets a creditor must take steps to ensure that they have control over the assets and a third party cannot purchase the secured asset.
- The Cayman Islands Companies Act requires that all security interests be detailed in the register of mortgages and charges of the debtor company. This register must be maintained by the registered office.

Commented [BT12]: 2 1/2 marks. Don't forget that the recording of the security interest in one of the government registers creates priority whereas recording (or failure to record) in the ROM&C does not.

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?

Commented [BT13]: 4 marks

Yes, the Grand Court has the power to assist foreign bankruptcy proceedings through a number of mediums:

- In accordance with Part XVII of the Companies Act, the Grand Court has the powers to make orders to support foreign insolvency proceedings;
- The Cayman Islands have not implemented UNCITRAL Model Law, although the principles are followed;
- The Grand Court can provide ancillary relief by giving a foreign representative the right to act in the Cayman Islands on behalf of a debtor.

The circumstances that the Grand Court can provide these powers for the purpose of reorganising or rehabilitating an insolvent debtor.

When the Grand Court is determining whether to make the ancillary order, the Grand Court is guided by economic and expeditious administration of the debtor's estate.

Question 2.3 [maximum 3 marks]

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

The Cayman Islands has a co-operative approach to assist with an effective winding-up and protecting the creditors interests.

The Foreign Judgements Reciprocal Enforcement Act (1996 Revision) ("Act 1996") provides a statutory scheme for recognition and enforcements of foreign judgements where the country that the judgement is from gives substantial recognition to Cayman Islands judgements.

To be enforceable the judgement must be final, a money judgement and made after the 1996 Act.

There has been limited use of Act 1996, recognition of foreign judgements is usually achieved by commencing a new action in the Cayman Islands under common law based upon foreign judgements. These actions are conducted **under** the regular litigation channels in the Cayman Islands i.e. the Grand Court Rules.

Requirements for enforcement under common law are – the judgement must be final, foreign court had jurisdiction over the debtor, the foreign judgement was not obtained by fraud, the foreign judgement does not go against foreign policy.

A six year limitation applied for both Act 1996 and common law enforcement.

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.

It is possible for a court appointed liquidator to hold the former directors accountable.

Section 147 of the Companies Act deals with fraudulent trading. If the directors carried out the business to defraud creditors the liquidator may apply for the court to order the accountable director to make a contribution to the company's assets to rectify the misconduct.

Directors can be personally liability to the company for losses that they cause the company if they breach their fiduciary duties to act in the best interest of the company.

In accordance with Prospect Properties v McNeill the Grand Court rules where a company is insolvent, the directors duties are to the company's creditors.

The liquidators can pursue claims against the directors on behalf of the company when the directors have breached their fiduciary duties.

Commented [BT14]: 3 marks

Section 99 of the Companies Act details that any disposition of assets made after the commencement of the winding-up (the date the petition was made) will be void if a winding up order is made. The liquidator can apply for the return of the assets or repayment of the assets.

Furthermore, there is a claw back mechanism under section 145 of the Companies Act, payment or disposal to a creditor is deemed a voidable preference if it is 6 months before the commencement of the liquidation when the company couldn't pay their debts and the intention of the director was to give the creditor a preference over the other creditors. The liquidator can apply to the Grand Court to order the creditor to return the asset.

In accordance with Section 146 of the Companies Act a transaction that is undervalued and with the intention to defeat an obligation owed to a creditor is voidable on application by the liquidator.

Question 3.2 [maximum 6 marks]

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

The above statement is not correct, as Receivers have an important role in Cayman Islands insolvency.

Receivers may be appointed even though they are not explicitly mentioned in the Companies Act or the CWR; although the Grand Court does note that a receiver may be appointed to collect money. The following orders govern a receivers appointment:

- Order 30 details the appointment and duties of the receiver;
- Order 45 details that receivers may be appointed to enforce court orders; and
- Order 51 allows for the appointment of receivers with equitable execution.

Receiverships are specifically provided for by Cayman Islands law for Segregated Portfolio Company ("SPC").

An SPC is where a company creates different portfolios for different assets and liabilities in the portfolios. Then, each portfolio is ring-fenced through legislation for the other portfolios.

The receiver order directs the segregated portfolio asset of the portfolio must be managed by the receiver detailed to close down that portfolio and distribute the assets of the specific portfolio.

A receivership order cannot be made if the segregated portfolio is in the process of being wound up and will cease to be in effect if a winding up order is filed.

The main use of receivers by creditors is to give an alternative course of action for creditors. Receivers do not need to be court appointed and the receivers duties are usually due to the creditors.

The receiver will act under the powers set out in the governing charge documents, which will typically include the right to sale. The Receiver is responsible for realising the asset and repayment the amount to the creditor. This processes is however, not supervised by the Grand Court and has a duty to the creditor and not 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

Commented [BT15]: Candidate successfully hits the main points. More detail would have secured the remaining 2 marks. 7 marks.

Commented [BT16]: 6 marks

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) In order for Sparrow to protect its interests as a secured creditors with security over the assets, Sparrow could enforce on the four party boats that they have security on. Sparrow can do this without leave of the court as the secured interest sits outside of the liquidation. Sparrow may then prove the remaining \$120 million debt in the liquidation as an unsecured balance. Sparrow will need to provide a proof of debt detailing the particulars of the security and the value of the security.
 - b) As an unsecured creditor, Roger Jolly could protect its interests by filing a winding-up petition in respect of S&C to place S&C into official liquidation.
 - c) As a preferential debt the employee could file a winding-up petition in respect of S&C to place S&C into official liquidation.

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]: 1/2 mark. RJ can apply for recognition and enforcement of the arbitral award since the New York Convention has been extended to the Cayman Islands. The key point is that RJ has to apply to have the judgment recognised in the Cayman Islands. Once it does so, a range of enforcement remedies become available to it, including a charging order, writ of execution, examination of judgment debtor, attachment of earnings, garnishee proceedings and the ability to petition to wind up S&C (since RJ will be an unsecured creditor). If winding up petition has already been filed, there may be a moratorium preventing JR from taking any of the enforcement actions mentioned above in which case it will be left to file a proof of debt for its US\$50m as part of the official liquidation.

Commented [BT19]: 1 mark. 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.

- d) The Grand Court has jurisdiction over S & C as the company is incorporated in the Cayman Islands.
- e) S&C could protect itself from creditor enforcement and seek to restructure, it could place itself into a light touch provisional liquidation to trigger a stay. This would require the appointment of a provisional liquidator and S&C to explain to the Grand Court, why the directors believe that the company can be turned around by the proposed scheme of arrangement.
- f) As S&C plan on entering a light touch provisional liquidation, the Rackham family would be allowed to continue to play a part in running S&C, however, this is subject to the supervision of the provisional liquidator and the Grand Court. During the provisional liquidation, the provisional liquidator's powers replace the director's powers.
- g) S&C can make an ex parte application for a provisional liquidation on the grounds that:
- a. S&C is, or is likely to become able to pay its debts within the meaning of section 93 of the Companies Act; and
 - S&C intends to present a compromise or arrangement to its creditors under section 86 of the Companies Act.

Commented [BT20]: 1 mark.

Commented [BT21]: 2 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 ***

40 / 50