



**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]:** Incorrect. A.

#### **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]: 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?

[Yes. A creditor can register its security at Cayman Island provided the said assets in question is located in the same jurisdiction. Even though Cayman Island does not have a public security regime for registering assets, it is imperative for the creditor to ensure the assets whether in mortgage or charges are duly listed and registered in the debtor's company. Under Section 54 of the Cayman Island Companies Act, confirms that, security interest must be maintained in the registered office of the debtor's company. <sup>1</sup> The positive effect it gives creditors flexibility to ensure their security are duly captured in the debtor's company. Now, consequence to update assets in the register of the debtor company accordingly does not invalidate the security interest.]

Commented [BT12]: 1 1/2 marks. Candidate may wish to refresh their memory on the central registers (real estate, vessels) and their effect.

#### 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?

[Yes. Cayman Island has not yet implemented the UNCITRAL Model Law or any treaty to insolvency matters. However, Cayman Island has the power to assist foreign bankruptcy proceedings. The following are the sources of power granted under Part XVII of the Companies Act and Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018. The Circumstances under which the Grand Court may exercise its powers include but not limited to the following:

1. Grand Court can provide ancillary relief giving recognition to the foreign practitioners to act in the jurisdiction
2. Allowing for commencement and stay of any legal proceeding a debtor company
3. Execution of judgement or stay of enforcement of a judgment
4. Order to reproduce information and /or debtor hand over of property to the foreign representative

<sup>1</sup> Companies Act, Section 54

In sum, the Grand Court also has its utmost discretion under the Companies Act, section 232 to exercise its powers of the above<sup>2</sup>

**Commented [BT13]:** 3 marks. Decent enough answer but the examiner was looking for the candidate to outline the statutory test that governs the exercise of the power.

### Question 2.3 [maximum 3 marks]

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

- [a) The judgement must be final
- b) Foreign Court must have jurisdiction over the debtor's company
- c) Judgement should not be obtained fraudulently
- d) Judgement must not be adverse with the Cayman Island Public Policy
- e) Judgement must not be obtained outside the remit of natural justice

**Commented [BT14]:** 1 mark. For more marks, reference is required to the Act (which has limited application) and common law.

### 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.

[Yes. Section 147 of the Cayman Island Companies Act

Directors can be liable to financial damages or any other payment by the Court appointed Liquidator if established they acted in breach of their fiduciary duty while without the best possible interest of the company.

After conducting an investigation to establish the fact about the breach of the director's duty, the Liquidator can file an ex-parte application to the Grand Court on the grounds that there is prima facie evidence against the directors to "Claw-Back" those transactions or pay for damages on behalf of the Company.

*As cited in the case "Prospect Properties v McNeill, the Grand Court held that where a Company is insolvent, the directors' duty to act in the best interest of the company requires them to have regard to the interest of its creditors. It is in the interest of the creditors to be paid and it is the interest of the company to be safeguarded against being in a position where it is unable to pay"<sup>3</sup>*

**Commented [BT15]:** 4 marks. There is more to this question/answer than section 147 alone (e.g sections 99, 135, 145, 146)

<sup>2</sup> Ibid 242

<sup>3</sup> [1990-91 CLR 171] as cited *INSOL Foundation Certificates Cayman Island Insolvency Law* - in pg 41 of the

### Question 3.2 [maximum 6 marks]

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

[Section 224 to 227 of the Companies Act

Companies Act defines a receiver as “the person specified in a receivership order for the specific section under 224(3).”<sup>4</sup> It is imperative to note that, receivers have a role to play in the Cayman Island Insolvency system.

Secured creditors may move to appoint a receiver to enforce security pursuant to their rights. Despite Order 30 of GCR dealing with the appointment of receivers, Order 45 of GCR also states the role of receivers in dealing with the enforcement of Judgement among others, receivers have a role to play in Insolvency proceedings in Cayman Island which the Companies Act, makes provision for receivers accordingly.

The Grand Court may also make an order allowing Segregated Portfolio Companies (SPCs) to be managed by a receiver to ensure proper winding up or closing down the business and distributing of the assets attributable to the particular entity under distress.

*“(3) A receivership order shall direct that the business and segregated portfolio assets of or attributable to a segregated portfolio shall be managed by a receiver specified in the order for the purposes of- (a) the orderly closing down of the business of or attributable to the segregated portfolio; and (b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto...”<sup>5</sup>*

In view of these and more, their roles are very important in the Cayman Island Insolvency System.] |

### 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

<sup>4</sup> Ibid, s212

<sup>5</sup> Ibid, s244(3)

**Commented [BT16]:** 3 marks. Question required the candidate to distinguish clearly between receivers appointed pursuant to 1. GCRs, 2. Companies Act (SPCs only) and 3. contract.



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) Under Section 142 of the Companies Act, a secured creditor is not prohibited from enforcing their security. Sparrow can file a petition to the Grand Court to enforce his right over the security to S & C are protected. Alternatively, Sparrow can also file for Official Liquidation by making an application to the Grand Court on the grounds that the S&C insolvent in accordance with section 124, that

- a) S&C is likely to become insolvent
- b) The supervision of the Court will facilitate a more efficient economic or reasonably liquidation of S & C in the best interest of all parties especially creditors

In addition, Sparrow under section 104(2) of the Companies Act, can make an application, ex-parte to make a case for a winding up and also make a case to appointment of a provisional liquidator is necessary to preserve the assets, prevent oppression of minority shareholder, prevent mismanagement of the company's affairs by the directors.

b) The Grand Courts exercises its discretion as set out under 243 of the Act to assist a foreign company. Besides, Roger Jolly can commence a new action as an unsatisfied debt and must satisfy the following 5 requirements to enforce a foreign judgement:

1. Judgment must be final
2. The foreign court had jurisdiction over the debtor
3. Foreign judgment was not obtained by fraud
4. A foreign judgement is not contrary to the public policy of the island
5. Foreign judgement was not obtained contrary to the rules of natural justice

**Commented [BT17]:** 1.5 marks. Good, although enforcement of a security does not require a petition to wind up. 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 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.

c) Normal rules governing break of contract applies. They can file to the labour office or during the liquidation process, they can be classified as preferential debts ranked before taxes due to Cayman Island government, among others under section 141.

d) Grand Courts has jurisdiction over the following companies under section 91 of the Companies Act

- a) Incorporated in Cayman Island
- b) Incorporated elsewhere but subsequently registered in the Cayman Islands; or
- c) In respect of a foreign company which
  - Has property located in the islands;
  - Is carrying on business in the islands;
  - Is the general partner of a limited partnership; or
  - Is registered under Part IX (a co-called "Overseas company)

In view of this Cayman Island has jurisdiction over S & C since it was registered in the island.<sup>6</sup>

e) S & C can apply to the Grand Court for provisional liquidation or S& C may consider a scheme of arrangement. In this case, the business will be given some moratorium to restructure.

Scheme of arrangement 86 Companies Act

They can also consider a scheme of arrangement where the liabilities can be restructured or reorganise their share capital, alter the shareholder and creditors distribution rights r equity swap. Arrangement or compromise entered between S & C and its creditors.

Alternatively, under section 104 (3) can file an ex parte application for provisional liquidation on the following grounds;

- "a) the company is, or is likely to become, unable to pay its debts within the meaning section 93;
- b) the company intends to present a compromise or arrangement to its creditors under section 86 of the Companies Act"<sup>7</sup>

f) Under the scheme of arrangements, management can stay in control to assist in the process under strict supervision. In the case of provisional liquidator, Grand Court will determine which powers will be exercised by the Directors of S & C.

From the option above, they must step aside to allow for the provisional liquidator to handle the company.

g) The applicant must demonstrate to the Cayman Island Grand Court that there are positive, consensual restructuring discussions have been taking place prior to the application being made. Under section 104(3) can be made by company on grounds whether the company become unable to pay its debts as they fall due and company intends to present a compromise or arrangement.

**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. It depends on the terms of the PL order. As per provisions of section 104(1)(4) of the Companies Act, once appointed by the court a provisional liquidator will carry out only such functions as the Court may confer on him/her and will exercise such powers as may be conferred by the order of appointment.

<sup>6</sup> Ibid,s91

<sup>7</sup> Ibid, s104(3)

The procedure for obtaining approval for a scheme of arrangement is governed by order 102 rule 20, under the Grand Court Rule (GCR) and Practice Direction 2/2010. Upon satisfying the procedure, as follows:

1. Convening hearing: An application to convene a meeting of creditors for approval of scheme which must be made through the Grand Court
2. Scheme meeting: He a proposal tabled during the meeting may either be approved or rejected depending on the proposed plan. This is done in accordance to the convening hearing order.
3. Sanction hearing: The approval from the meeting is then sent to the Grand Court to obtain approval.] |

**\* End of Assessment \***

**31.5 / 50**

**Commented [BT23]:** 1.5 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.