



**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?***

A creditor can register security over an asset in Cayman but if this happens post the filing of a WUP it will likely be invalid. Assuming there is no such petition, however, how a creditor registers security depends on the type of asset over which they are seeking security.

For example, a mortgage over land/property must be created by deed and validly executed. It should be recorded on the relevant land register and the Registrar of Lands must be updated. If it is an equitable mortgage the creditor would be best protected by ensuring they have a power of attorney in the event of default.

**Commented [BT12]:** Candidate demonstrates some knowledge but the question was really calling for: a. reference to the registration of certain types of asset on the central registers and the effect of doing so and b. registration via the ROM&C and its effect. 1 mark.

A fixed charge is typically created by deed and is over specific assets, whereas a floating charge can be over a group or class of assets.

The effect of registering security over an asset is that in the event of default the creditor can move immediately to enforce the debt owed against the relevant asset or assets. This is even so once the debtor has been declared bankrupt or a winding up has commenced, other than in the case of a floating charge. The process of realisation will be by way of appointment of a receiver. Secured creditors (other than floating charge holders) fall outside of any liquidation.

As to floating charge holders, if the charge has not crystallised at the commencement of the winding up, they will be forced to be part of the winding up process and submit a proof of debt in the usual way but they will have priority over the claims of any unsecured creditors.

#### Question 2.2 [maximum 4 marks]

***Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?***

The Grand Court does have the power to assist foreign bankruptcy proceedings. The Grand Court's powers to assist foreign bankruptcy proceedings are derived from Part XVII of the Companies Act.

The Cayman Islands is also a member of the Judicial Insolvency Network ("JIN") and has adopted the JIN Guidelines for Cooperation in Cross-Border Matters. Practice Direction No: 1 of 2018 (Court-to-court Communications and cooperation in cross-border insolvency and restructuring cases) sets out the applicability of the JIN Guidelines, together with the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to Court Communications in Cross-Border Cases.

The Grand Court also has powers in accordance with the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 (the "FBPR").

In determining whether or not to assist a foreign bankruptcy the Grand Court will be guided by whether providing such assistance will best assure an economic and expeditious administration of the debtor's estate, consistent with:

- The just treatment of all holders of claims, wherever domiciled;
- The protection of claim holders in the Cayman Islands against prejudice and the inconvenience in the processing of claims in foreign proceedings;
- The prevention of preferential or fraudulent dispositions of property within the debtor's estate;
- The distribution of the estate among creditors which should remain substantially in accordance with the Cayman statutory order of priority;
- The recognition and enforcement of security interests created by the debtor;
- The non-enforcement of foreign taxes, fines and penalties; and
- Comity.

It is an important principle in Cayman that creditors be treated equally, regardless of domicile, and the judge will consider whether assistance to a foreign bankruptcy will achieve that before exercising any powers.

Commented [BT13]: 4 marks

### Question 2.3 [maximum 3 marks]

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

For judgments from the Superior Courts of Australia, in accordance with Order 71 of the GCR, these are governed by the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the "FJREA"). To be enforceable the foreign judgment must be a money judgment which is final and was made after the FJREA was extended to the Superior Courts of Australia.

Commented [BT14]: 3 marks

For all other countries and territories the enforcement of foreign judgments relies upon the common law and is usually achieved by issuing new proceedings in the Cayman Islands based on the foreign judgment and the outstanding debt or other obligation under the terms of the foreign judgment.

The Court's powers under the common law include the power to enforce both money and non-money judgments, including declaratory judgments.

For a foreign judgment to be enforceable at common law it must be:

- A final judgment;
- Not obtained by fraud;
- From a foreign court which had jurisdiction over the debtor;

- Not contrary to the public policy of the Cayman Islands; and
- Not obtained contrary to the rules of natural justice.

Once the Cayman courts delivers its judgment and order, it is then enforceable in the same way as any other domestic judgment/order and all the usual enforcement powers apply.

### 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 can be made personally liable to the company for any losses which they caused the company if the losses are a result of the Director(s) acting in breach of their fiduciary duty to act in the best interests of the Company. Liquidators, once appointed, can pursue claims against the directors on behalf of the Company and in the Company's name for breach of fiduciary duty. See for example *Prospect Properties v McNeill* where the directors had improperly declared a dividend and entered into various agreements for the transfer of shares, none of which were in the best interests of the Company. The Company was at best of doubtful solvency. As such the directors had failed to act in the best interests of the company which, given the doubtful solvency, more likely technical solvency, required them to act in the best interest of the creditors.

Alternatively, in accordance with section 147 of the Companies Act (2022 Revision) (the “Act”), if the Directors carried on the business of the Company with the intent to defraud the creditors, or for any fraudulent purpose then the liquidator can apply for an order requiring any persons knowingly involved in the conduct to make a contribution to the Company's assets.

Creditors can in some instances bring a derivative action against the directors but not once a liquidation has commenced.

Other options open to liquidators which are not directly against directors but can claw back payments include:

#### Avoidance of Property Dispositions

In accordance with section 99 of the Act, any dispositions of the company's property made after the commencement of the winding up (which is the date upon which the petition was filed) will be void once the winding up order is made unless validated by the Grand Court. The liquidators can apply for such validation.

#### Voidable preference

This mechanism does not require the transaction to occur after the winding up petition (“WUP”) has been filed. In accordance with section 154 of the Act any payment or disposal of property to a creditor amounts to a voidable preference if it occurs within the six months before the WUP is filed, and at a time the Company was unable to pay its debts, and the dominant intention of the Company's directors was to give that creditor preference over other creditors.



If the effect was to give preference but the dominant intention was, for example, to secure continued essential services to the Company by the relevant creditor and not to give that creditor preference, then it will not be a voidable preference.

#### Avoidance of dispositions made at an undervalue

In accordance with section 146 of the Act, a transaction in which property is disposed of at an undervalue and it was so disposed with the intention of wilfully defeating an obligation owed to a creditor, the transaction is voidable upon the application of a creditor or, once in liquidation, the liquidator.

The burden is on the applicant to prove the transaction was at an undervalue, which means proving that there was either no consideration or that the consideration for the property in money, or money's worth, was significantly less than the value of the property.

Commented [BT15]: 8 marks

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

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

Receivers can play a very useful role in an insolvency scenario. Secured creditors are entitled to appoint receivers as of right over secured assets, whether or not an insolvency has been commenced. Such costs are borne directly and solely by the secured creditor (although the terms of the security may permit recovery out of the assets of the company, either on a secured basis or as an unsecured creditor). As such receivers can perform an important and useful function and take part of the burden off of any appointed liquidators. This view does not, however, appear to be shared by most liquidators.

They can also have a useful purpose in some specific contexts, for example in relation to Segregated Portfolio Companies. The SPC, and the majority of the Segregated Portfolios may be solvent but there may be one SP which is not. It is insolvent but an individual SP cannot be wound up on its own. As such receivers can step in to properly deal with assets and liabilities in the absence of any liquidator – see for example FSD 177 of 2020 (In the Matter of Simplon Capital Ltd. SPC) where funds had been improperly diverted from one SP to another and a receiver was appointed.

Commented [BT16]: Good. 5 marks.

#### **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?

In this instance S& C should first of all be made aware that the Grand Court of the Cayman Islands will have jurisdiction over S & C by virtue of the fact that is a company registered in the Cayman Islands (answer (d)).

S&C has realised that it cannot afford its ongoing costs and cannot afford to pay a legitimate foreign judgment due which can in all likelihood be recognised and enforced in the Cayman Islands. Knowing it is insolvent, or at the very least of doubtful solvency, S&C must act in the best interests of their creditors. They should not continue to trade whilst insolvent and they should consider either winding up the company or seeking to re-structure the debt with immediate effect (answer (a)).

In accordance with section 104(3) of the Act, S&C should consider protecting its interests by making an immediate application to the court to appoint a provisional liquidator (or more likely joint provisional liquidators ("JPLs")) on the basis that S&C is or is likely to become unable to pay its debts and/or it intends to present a compromise or arrangement to its creditors (answer (a) and (e)). If S&C really believes that a corporate rescue may succeed, it can consider putting a scheme of arrangement to its creditors. This can be achieved through a light touch insolvency which would allow the Rackham family to continue to pay a part in running S&C during the restructuring process, albeit under the supervision of the JPLs and the Court

**Commented [BT17]:** 0 marks since question has not been addressed. 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. It 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.

**Commented [BT19]:** 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.

(answer (e) and (f)). To achieve the desired scheme of arrangement S&C would need more than 50% of the creditors voting in each class, representing 75% or more of the value of those creditors, to vote in favour of the scheme. If any one class votes against the scheme, the scheme will fail.

In determining whether or not to approve the proposed restructuring (answer (g)) the Grand Court will be governed by GCR O.102, r.20 and PD 2/2010. The Grand Court must be satisfied that the scheme document and supporting explanatory statement contained all the information reasonably necessary to enable the scheme creditors (as this is an insolvent liquidation) to make an informed decision about the scheme.

The Court will want to be satisfied that there has been compliance with the convening orders and that the majority fairly represent the relevant class. The Court will also consider whether the arrangement is one which an intelligent, honest member of the class convened, acting in his own interest might reasonably approve.

As to Roger Jolly, Roger Jolly should take immediate steps to have the foreign judgment recognized in the Cayman Islands and enforce the judgment as soon as it possibly can. Roger Jolly could also seek a form of security from S&C although this may be avoided in accordance with section 99 of the Act. If Roger Jolly offered a compromise on the debt in exchange for a security it is possible the court would validate the security although perhaps still unlikely (answer (b)).

The employees (answer (c)) would frankly be best advised to seek alternative employment or to apply for the government stipend. The employees claims will rank as a preferential debt in the liquidation (see section 141 of the Act) but there is little the employees themselves can do prior to the appointment of liquidators against what is clearly an insolvent company. There is little point issuing a claim or applying to the Labour Tribunal at this stage. They will ultimately have to prove their debt for their wages in the insolvency.

**\* End of Assessment \***

**38 / 50**

**Commented [BT20]:** 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.

**Commented [BT21]:** 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.

**Commented [BT22]:** 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 US50m as part of the official liquidation.

**Commented [BT23]:** 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.