



**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?

Depending on whether the asset is in relation to real estate, ships, aircrafts, motor vehicles and/or intellectual property, there is the ability to place a creditors interest on the ownership register whereby the mortgages and charges against those particular assets can be shown for the benefit of the secured creditors (i.e. third party purchasers wishing to purchase any of these particular assets are subject to the mortgages and charges listed on the register). The Cayman Islands do not have a public/private security registration regime for other assets and therefore it is important for a creditor to take steps to convey that it has the necessary and sufficient controls over an asset to prevent a third party from coming underneath and purchasing the same.

Commented [BT12]: 3 marks

Under section 54 of the Companies Act, security interests must be entered in the register of mortgages and charges of the debtor company, however, the effect of registering the security interest of these particular assets on the debtor company's register of mortgages and charges does not create priority; the advantage is that the register may be inspected by any member of the company / creditor thus putting any third parties on notice by showing the existence of the security. The relevant law regarding priority and perfection of the security interest is determined by the asset location (per the Cayman Islands conflict of laws rules).

#### 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 with foreign bankruptcy proceedings – the source of that power stems from Part XVII of the Companies Act (International Co-Operation), whereby the Grand Court has powers to make orders in support of foreign bankruptcy proceedings. Other relevant procedures include: the CWRs Order 21 (International Protocols), the Grand Court Act, section 11A (Interim relief in the absence of substantive proceedings in the Islands) and the Grand Court's Practice Direction 1 of 2018.

The circumstances by which the Grand Court can provide this power is for the purposes of reorganising or rehabilitating an insolvent debtor and the circumstances by which it can exercise these powers is to achieve an economic and prompt foreign bankruptcy proceeding and is to be consistent with:

Commented [BT13]: 4 marks

- the just treatment of all claim holders (wherever they are domiciled);
- the protection of Cayman Islands claim holders against any prejudice and/or inconvenience in processing foreign proceeding claims;
- the prevention of preferential or fraudulent dispositions of property in the debtor's estate;
- the use of the statutory order of priority when distributing of the estate among creditors;
- the recognition and enforcement of security interests created by the debtor;
- the non-enforcement of foreign taxes, fines and penalties; and
- comity (i.e. a mutual recognition / co-operation of legal decisions).

### Question 2.3 [maximum 3 marks]

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

As the Cayman Islands have not adopted any international treaties for recognition of foreign judgements, section 3(1) of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) ("FJREA") provides the statutory mechanism for recognition (and enforcement) of foreign judgments in the Cayman Islands (provided the country from which the original judgment originates guarantees significant reciprocity for the enforcement of the Cayman Islands foreign judgement). The legal framework is governed by Order 71 of the Grand Court Rules (specifically, Rule 1 of Order 71).

For the recognition to then be enforceable, the foreign judgment must be final, a money judgement and was entered into after the FJREA was extended to the relevant foreign country.

Commented [BT14]: 1 mark. Given the limited application of the Act, this question requires discussion of the common law route and its requirements.

### 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.

#### Voidable preference claim

Section 145 of the Companies Act allows for a claw-back mechanism whereby the wrongful payment by the director/ former director to a creditor constitutes a voidable preference if it a.) it occurred 6 months prior to the commencement of the company's liquidation at a time where it was insolvent (i.e. unable to pay its due debts) and b.) if the intention of the director/ former director was to give the creditor in receipt of the payment a preference over other creditors (i.e. a dominant intention). This also applies to a disposition made to a related party. The liquidator may apply to the Grand Court to order the creditor/related party to return the funds/disposed asset and for that creditor/related party to prove in the liquidation for the amount of its claim.

#### Avoidance of dispositions made at an undervalue

Section 146 of the Companies Act allows for the voidable application (within 6 years of the disposal) to be made by the liquidator for dispositions made at a.) undervalue and b.) with the intention of wilfully defeating an obligation owed to a creditor (i.e. being an intent to defraud).

#### Fraudulent Trading

Section 147 of the Companies Act deals with fraudulent trading and allows for a liquidator to apply for an order to require any persons (not only directors/ former directors) who were parties aware of the fraudulent trading to make contributions to the company's asset as the Grand Court sees fit and proper.

A breach of a directors / former directors fiduciary duties can be pursued by the company's liquidator and such breach can place a personal liability upon the director/former director for losses caused to the company as a result of breaching their fiduciary duty to act in the best interests of the company and creditors (see Prospect Properties v McNeill).

As explained above, Court appointed liquidators are given wide-ranging powers in order to seek financial damages against directors/former directors of an insolvent company. Their powers also include the ability to compel former directors to provide statements (supported by an affidavit) in relation to the company's affairs and may compel former directors, via obtaining leave from the Court, to submit to an oral examination.

**Commented [BT15]:** Good. 7 1/2 marks. A little more detail would have achieved full marks.

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

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

This statement is incorrect. Under a Cayman Islands insolvency scenario, a secured creditor may appoint a receiver in order to enforce security rights attached to the secured creditor's asset holding.

The main relevance of receivers within the context of a Cayman Islands insolvency is that a receivership offers an alternative course of action for certain types of creditors. For example, holders of fixed/floating charged assets can appoint receivers through the security instrument in place between the debtor and those particular creditors which does not require the involvement of any court, subject to the debtor defaulting and that charge document allows for the appointment of receivers (see Scotiabank (Cayman Islands) Limited v Treasure Island resort (Cayman) Limited [2004-2005 CILR 423]). The role of the receivers is to act via the powers stipulated within the charge document with the ultimate goal of realising the debtor's charged assets to repay the creditor's outstanding debt with the debtor. The receivers' duties under this scenario are due to the creditor and not to the debtor.

Further, although the role of receivers is not included within the statutory provisions of the Companies Act and CWRs, the Grand Court Rules ("GCM") (Order 30) allows for the appointment of receivers via the Grand Court for the purposes of collecting monies (GCM Order 45 – allowing for the Grand Court to enforce order for the payment of money) and to carry out other acts, such as an appointment of receivers to execute a contract or title document (GCM Order 51 – allowing for the appointment of receivers by equitable execution).

**Commented [BT16]:** Good but what about SPCs? 4.5 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?

Sparrow must make sure that it has registered its mortgage over the four party boats of S&C on Cayman Islands Shipping Registry (which is a division of the Maritime Authority of the Cayman Islands) which will restrict the ability of a third-party (i.e. putting them on notice) to purchase the party boats as it will be subject to the interests of Sparrow. Further, provided that S&C has defaulted on the debt, Sparrow is permitted to take possession of the party boats and exercise its power of sale or to appoint a receiver to realise the party boats. For the remaining \$120 million of debt, Sparrow can claim its interest as an unsecured creditor.

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

Roger Jolly can use a lien to protect its interests, whereby it may keep possession of the party boats that have been built (that is, if any of the boats have started to be constructed) and has a right to keep possession of the boats until the debt has been paid. Further, the ruling by ICC in London can have an enforcement effect in the Cayman Islands for Roger Jolly to apply for the winding up of S&C as it can make an application to prove that it is insolvent.

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

The employees of S&C are viewed as preferential creditors under Cayman Islands insolvency law and therefore a petition may also be presented to have S&C wound up by the Cayman Court in order to protect their interests, no matter where the employees are situated.

**Commented [BT17]:** Good. 1.5 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. 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]:** 1/2 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 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) Does the Cayman Islands Court have jurisdiction over S & C?

Yes – the Cayman Islands Court has jurisdiction over S&C as it is registered the Cayman Islands.

Commented [BT20]: 1 mark.

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

A provisional liquidation (“PL”) can be used in order to preserve and protect S&C’s assets prior to it being wound up. The PL can be used to facilitate a compromise or scheme of arrangement. A PL will provide an automatic stay to S&C in order to try and come to a solution by using the compromise of scheme of arrangement.

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.

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

Yes – in the case of a ‘light touch’ PL, existing management by the Rackham family is allowed to continue under the supervision of the provisional liquidators and the Cayman Court.

Commented [BT22]: 1 mark.

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

Per section 104(3) of the Companies Act, S&C has ground to make an *ex parte* application for the PL provided that that:

- a) S&C is, or is likely to become, unable to pay its debts within the meaning of section 93 of the Companies Act; and
- b) S&C intends to present a compromise or scheme of arrangement to its creditors per section 86 of the Companies Act.

Commented [BT23]: 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 / 50**