



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?

Creditors can take security over immovable and movable assets in the Cayman Islands. Pursuant to section 142 of the Companies Act, a creditor that has security (could be in whole or in part over a company's assets) is entitled to enforce its security (even if a winding-up order is in place) without the leave of the Grand Court. Unlike in Chapter 11 proceedings in the United States, there is no concept of a stay on enforcement by secured creditors in the Cayman Islands.

Practically, a creditor can register its security in the Cayman Islands over real estate, ships, aircraft, motor vehicles and intellectual property by way of ownership registers. But given there is no public security registration for other assets, a creditor must take sufficient steps to make sure it has proper control over an asset and prevent others from purchasing it. Importantly, registration has the effect of putting third parties on notice of the existence of a security, if done properly.

Commented [BT12]: More detail required on the distinction between central registration and ROM&C (and the effect/limitations of registering on each) required for full marks. 2 marks.

Question 2.2 [maximum 4 marks]

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

The Cayman Islands is a centre for international finance with the vast majority of its liquidations concerning cross-border issues, and accordingly, the Grand Court has the powers to make orders in support of foreign insolvency proceedings – provided for in Part XVII of the Companies Act. Given that the Cayman Islands does not follow UNCITRAL and it is not a member of the EU, there are no threshold tests or automatic tests for the debtor to hit. Instead, debtors must satisfy the Cayman Islands Grand Court's discretion that it is appropriate to grant any forms of ancillary relief in the foreign representative's application to the Grand Court.

Commented [BT13]: 4 marks

The Grand Court is guided by its discretion to attempt to assure the timely and cost-effective administration of the debtor's estate, which is consistent with the following principles:

- Comity;
- Non-enforcement of foreign taxes, fines, and penalties;

- Recognition and enforcement of security interests created by the debtor;
- Distribution of the debtor's estate in the statutory order of priority;
- Prevention of preferential or fraudulent dispositions of property in the debtor's estate;
- Protection of Cayman Islands claim holders against any prejudice and/or inconvenience in processing foreign proceeding claims; and
- Just treatment of all claim holders from all domiciles in accordance with the principles of natural justice.

Question 2.3 [maximum 3 marks]

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

The Cayman Islands Grand Court uses a co-operative approach in its recognition of foreign judgments in cross-border cases.

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the "Act") provides a statutory scheme for recognition of foreign judgments in the Cayman Islands, however, the provisions of Act are only currently extended to judgments from the Superior Courts of Australia. This specific procedure is governed by Order 71 of the Grand Court Rules and a foreign judgment under this procedure is only enforceable if it is final, a money judgment, and made after the Act was extended to the relevant foreign country.

Foreign judgments are generally conducted under the Grand Court Rules or by commencing a local action in the Cayman Islands based on the foreign judgment as an unsatisfied obligation. Judgments are also enforceable using common law which has several mandatory requirements. Notably, once a local action is obtained (based on the foreign judgment), the full range of local enforcement remedies are available to the creditor.

Commented [BT14]: 2.5 marks. Listing of the mandatory requirements was required for full marks.

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 9 marks]

In the absence of a statutory prohibition on insolvent trading, is it possible for court appointed liquidators of an insolvent company, or creditors of such a company, to hold its former directors accountable by either seeking financial damages against those directors and / or by seeking to "claw back" any payments that those directors should not have made? If so, please explain the possible options.

If the dominant intention of the Cayman company's directors was to give preference to one creditor over another, according to section 145 of the Companies Act, this payment could be considered a voidable preference. To be considered as "giving preference", the director would need to be seen as putting one creditor in a better a position that it would have otherwise been.

Section 145(1) of the Companies Act sets out the following test in that if a conveyance of a Cayman company's asset is made for the benefit of a creditor at a time when the company is unable to pay its debts (defined in section 93 of the Companies Act) with a view to giving this creditor a preference over the other creditors of the company, that transaction shall be made invalid if made within six months prior to the commencement of a liquidation. It is noted that the case law *Weaving Macro Fixed Income Fund Ltd (in Liquidation)* is a good reference point as the Judicial Committee of the Privy Council considers each step of the test to be applied under section 145(1). If the director in this scenario made a payment under the above criteria, this payment would be subject to a "claw-back" provision if the court-appointed

liquidator made the appropriate application to the Grand Court to order the creditor to return the funds or asset received. If the payment was made in this scenario to a related party, that transaction could also be considered voidable and able to be clawed back. A liquidator would then apply to the Grand Court to order the creditor to have the asset returned and provide proof in the liquidation for the amount of its claim.

Section 147 of the Companies Act covers fraudulent trading by noting that if it appears to the liquidator that the business of the company was carried out with the intention of defrauding its creditors, the liquidator could apply to the Grand Court for a declaration stating that any persons (including the company's former directors) who knowingly aided and abetted these fraudulent actions are liable to contribute to the company's assets based on the Grand Court's discretion. There is Cayman case law to support that when a company is insolvent, it is the directors' duty to act in the best interests of the company and to have regard to the interests of its creditors in *Prospect Properties v McNeill*.

Additionally, if there was a disposition of property by a company which was made at an undervalue with intent to defraud its creditors, section 146 of the Companies Act allows for that transaction to be considered voidable by the appointed liquidator. In this case, undervalued is defined as a disposition of a company's property with no consideration in return, or for consideration which is worth considerably less than the value of the property disposed. "Intent to defraud" is defined in this section as an intention to wilfully defeat an obligation owed to a creditor; "obligation" is defined as a liability which existed on or before the date the disposition was made. |

Commented [BT15]: 8 marks

Question 3.2 [maximum 6 marks]

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

The above statement is not necessarily true. In personal/consumer bankruptcy, secured creditors may appoint receivers to enforce their security rights on the assets of a debtor.

Whilst receivers are not explicitly mentioned in the Companies Act or the CWRs, receivers may be appointed in certain situations relating to corporate liquidations. The Grand Court Rules (GCR) also provides for receivers to be appointed by the Grand Court for the purpose of collecting rent (or other monies) or to carry out an act (such as executing title). The GCRs are the prevailing regulation on receivers in the Cayman Islands and state the following about receivers:

- Order 30 GCR – governs the appointment and duties of receivers;
- Order 45 GCR – notes that receivers can be appointed to enforce court orders for the payment of money (such as judgments); and
- Order 51 GCR – notes that receivers can be appointed through an equitable execution.

Scotiabank (Cayman Islands) Limited v Treasure Island Resort (Cayman) Limited and TMSF v Merrill Lynch Bank and Trust Company (Cayman) Ltd are two examples of Cayman case law where receivers have been appointed.

Receivership orders are specifically provided for by Cayman statute in respect of Segregated Portfolio Companies (SPCs). An SPC is one entity that has segregated portfolios (SPs) which have assets and liabilities, separate from the other SPs. The Grand Court can appoint receivers, which have a role similar to that of a liquidator, over a single SP if it is determined that the assets are not likely to cover its liabilities. However, the receivership order must specify that the SP's business and assets is to be managed by a receiver to wind up the SP and distribute the SP's assets to those that have recourse or claims to them. A receivership

order may not be made over an SP if the SPC is already in liquidation and becomes nullified if the SPC is wound up.

Receivers in the Cayman Islands are mainly an alternative remedy for creditors as they can be appointed with involvement of the Grand Court dependant on the security rights over an asset. For instance, a creditor holding a fixed or floating charge over a Cayman asset can appoint a receiver over the asset in the event of a default by the debtor. The receiver in this context would owe its duties to the creditor.

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?

- Sparrow's interests include the US\$200 million loan provided to S&C, US\$80 million of which is secured with a mortgage over four of S&C's party boats. Sparrow must first act to register its security over the ships with the appropriate Cayman Islands ownership register to make sure that a third-party purchaser of those party ships will have notice of Sparrow's secured creditor interest in them. According to section 54 of the Companies Act, Sparrow must also register its security interest in the register of mortgages and charges of S&C (the debtor) in order to put third parties on further notice of the security interest.

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.

If S&C were to default on its loan (which appears possible given its recent delinquent payments) and Sparrow had properly registered its security interest over the S&C assets, I would advise Sparrow that it would have the ability to take possession of the party boats and exercise its power of sale over the assets, or appoint a receiver to realise the assets.

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

- Roger Jolly's interests include a judgment levied against S&C by the ICC of London ruling that S&C must pay damages of US\$50 million to Roger Jolly by mid-February 2022. If S&C does not pay Roger Jolly in full during that allotted timeframe, Roger Jolly could enforce upon the foreign judgment by commencing a local action in the Cayman Islands based on the foreign judgment as an unsatisfied obligation. Roger Jolly can use this unpaid judgment to apply to the Grand Court and have S&C wound up and placed into liquidation.

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\$0m as part of the official liquidation.

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

- Amounts owed to unpaid employees are considered preferential debts in the Cayman Islands, which rank second in priority after liquidation expenses (including petitioner's costs and JOLs' fees) in a liquidation scenario. Any creditor has standing to bring an application to the Grand Court to wind-up a company by petition, including the unpaid employees of S&C.

Commented [BT19]: 1.5 marks.

(d) Does the Cayman Islands Court have jurisdiction over S & C?

- The Cayman Islands Grand Court has jurisdiction over S&C as it is a company that is registered in the Cayman Islands and bases its operations in the Cayman Islands.

Commented [BT20]: 1 mark.

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

- S&C could make an application to the Grand Court for restructuring, however, before doing so, it is important to have the ability to demonstrate to the Grand Court that positive consensual negotiations are taking place between S&C and its debtors. The restructuring application to the Grand Court would most likely be for a scheme of arrangement along with an order for provisional liquidation. Provisional liquidation triggers an automatic stay to allow the company to engage in restructuring negotiations with its current slate of debtors, including reaching an agreement on a scheme of arrangement. A scheme of arrangement, as per section 86 of the Companies Act, is a court-approved compromise between a company and its creditors or shareholders.

Commented [BT21]: 3 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?

- Existing management, such as by the Rackham family, can be allowed to continue in control of S&C in a "light touch" provisional liquidation. The family would just be subject to supervision by the provisional liquidator and the Grand Court.

Commented [BT22]: 1 mark

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

- If S&C makes an *ex parte* application to the Grand Court for provisional liquidation, the Grand Court per section 104(3) of the Companies Act, the Grand Court will consider the following:
 - o That S&C is, or is likely to become, unable to pay its debts as they fall due; and
 - o S&C intends to present a scheme of arrangement to its creditors (defined in section 86 of the Companies Act).

- If S&C's creditors, shareholders or CIMA makes an *ex parte* application to the Grand Court for provisional liquidation as per section 104(2) of the Companies Act, the Grand Court, the Grand Court will consider the following:
 - o A provisional liquidator is necessary to preserve and protect S&C's assets, prevent the oppression of minority shareholder, or preclude mismanagement by S&C's directors;
 - o There is a *prima facie* case to make a winding up order. |

*** End of Assessment ***

40.5 / 50

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.