



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]: Incorrect. D.

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?

A creditor may register their security over an asset in the Cayman Islands if it is one of the following asset classes, real estate, ships, aircraft, motor vehicles and intellectual property, as ownership registers exist for these asset classes.

Commented [BT12]: What is the effect of registering security on the government registers v the ROM&C? Priority? 2 1/2 marks.

Per section 54 of the Companies Act security interests must be entered in the register of mortgages and charges of the debtor company and the register must be maintained in the Cayman Islands. A company's register is open for inspection by any member of the company or creditor and as a result third the registering of a security does put third parties on notice of the security's existence.

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 powers to make orders in support of foreign bankruptcy proceedings, as stipulated in Part XVII of the Companies Act (2022 revision). Per section 241 of the Companies Act the Grand Court may make orders upon application by a foreign representative for the purposes of:

- Recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor;
- Enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- Staying the enforcement of any judgment against a debtor;
- Requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
- Ordering the turnover to a foreign representative of any property belonging to a debtor.

In determining whether to make a supporting order the Cayman Court is guided by **matters** which will assure an economic and efficient administration of the debtor's estate. In accordance with section 242 of the Companies Act the Court should consider:

Commented [BT13]: 4 marks

- The just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
- The protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
- The prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
- The distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;
- The recognition and enforcement of security interests created by the debtor;
- The non-enforcement of foreign taxes, fines and penalties; and
- Comity.

Question 2.3 [maximum 3 marks]

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

The Foreign Judgements Reciprocal Enforcement Act (1996 revision) (the "1996 Act") provides a statutory scheme for recognition and enforcement of foreign judgement in the Cayman Islands. However, the statute is only applicable in circumstances where the country from which the judgement originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands judgements. As a result, the provisions of the Act have only been extended to Judgements from the Superior Courts of Australia to date. This procedure is governed by Order 71 of the Cayman Islands Grand Court rules and in order for the foreign judgement to be applicable it must be final, a money judgement and made after the 1996 Act was extended to the relevant foreign country.

As a result of the limited application of the 1996 Act the enforcement of foreign judgements in the Cayman Islands is typically achieved under common law through the commencement of a new action in the Cayman Islands based upon the foreign judgement being an unsatisfied debt or obligation. Both money and non-money judgements are enforceable via this approach.

For the enforcement of a foreign judgement under common law the following conditions must be satisfied:

- The judgement is final;
- The foreign court had jurisdiction over the debtor;
- The foreign judgement was not obtained by fraud;
- The foreign judgement is not contrary to the public policy of the Cayman Islands; and
- The foreign judgement was not obtained contrary to the rules of natural justice.

In respect of limitation, a six year limitation period applies for both common law enforcement and under the 1996 Act.

Commented [BT14]: 3 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.

Directors can be held accountable and personally liable to the company for any losses which they cause the company if it can be shown they acted in breach of their fiduciary duty to act in the best interest of the company. For a company in official liquidation proceedings the official liquidators can pursue claims against the directors on behalf of the company and in the company's name for breach of their fiduciary duties.

There is case law in Cayman in respect of directors fiduciary duty, in *Prospect Properties v McNeill* the Cayman Court held that where a company is insolvent the directors' duty to act in the best interests of the company requires them to have regard to the interest of creditors. It is in the interest of creditors to be paid and it is in the company's interest to be safeguarded against being put in a position where it is unable to pay.

The liquidators can also seek to make a transaction voidable, if, per section 146 of the Companies Act the liquidators can demonstrate that:

- Property of the company was disposed of at an undervalue (i.e. for no consideration or a consideration which is considerably less than the value of the property); and
- The transaction was made with the intention of willfully defeating an obligation owed to a creditor, i.e. there was an intent to defraud.

A transaction is voidable on the application of the liquidators and the burden of proof is on the liquidator to establish an intent to defraud. Any application made by the liquidators must be brought within six years of the disposal.

Should the directors have disposed of a company's assets between the time a winding up petition is filed and a winding up order being subsequently issued said disposals will be void, per section 99 of the Companies Act. In this event the liquidator is entitled to apply for appropriate relief to require the repayment of the funds or the return of the asset.

In addition, per section 145 of the Companies Act any payment or disposal of the company's property to a creditor constitutes a voidable preference if:

- 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 creditor in the relevant transaction a preference over the company's other creditors.

The relevant case law in respect of voidable transactions is re *Weaving Macro Fixed Income Fund Ltd (in Liquidation)* the Cayman Court of Appeal and Judicial Committee of the Privy Council considered in detail each stage of the test to be applied in identifying voidable preferences under section 145(1). For example, if the company's dominant intention in making the payment was in good faith, for example paying an essential service provider it might not be classed as a voidable transaction even if the effect of the payment is to prefer the creditor in question over the company's other creditors. A dominant intention may be inferred by the court from the available evidence.

The nature of the creditor is important in determining a voidable transaction, a disposition made to a related party of the company (for example a director) will be deemed to have been made with a view to giving a preference.

A disposal that is determined to be a preference is void and the liquidator may apply to the Cayman Court to order the creditor to return the asset and submit a claim in the liquidation for the amount owed to it.

Finally, under section 147 of the Companies Act if in the course of a company's winding up it appears that any business of the company was carried out with the intent to defraud creditors the liquidator may apply to the Cayman Court for a declaration. Should the Court determine fraudulent trading did occur any persons who were knowingly parties to the conduct in question are liable to make contributions to the company's assets as the Cayman Court thinks proper.

Commented [BT15]: 8 1/2 marks

Question 3.2 [maximum 6 marks]

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

Whilst Receivers are not explicitly mentioned in the Cayman Islands statutory provisions dealing with insolvency, namely the Companies Act and Companies Winding up Rules, however per the Grand Court rules Receivers can be appointed by the Court for the purposes of a specific function, for example executing a contract or collecting money, e.g. rent so a receiver is an option for the Cayman Court however, case law shows that typically an official liquidator is the officer that the Cayman Court will appoint to carry out an insolvent liquidation.

Whilst Receiverships may not be common in the liquidations of the majority of Cayman companies insolvency proceedings receiverships are specifically provided for by statute in respect of the Cayman Islands legal entity, the Segregated Portfolio Company. If the Cayman Court finds that a segregated portfolio's assets are likely to be insufficient to repay the portfolio's creditors the Court may make a receivership order in respect of that portfolio. The role of a receiver in the context of an SPC is similar to that of a liquidator. Therefore in respect of SPC winding up's (akin to a liquidation of a Cayman company) the receiver is a key function.

Outside of a court supervised process a receivership can offer certain creditors an alternative course of action to making an application for a winding up a company. For example, should the terms of the charging document provide for it a holder of a fixed or floating charge could appoint a receiver over the company's charged assets without court involvement. This may be beneficial for both parties by reducing the costs for the creditor and also reducing the impact on the debtors overall business as the publicity of a winding up petition can impact a company's operations as suppliers and customers may become concerned that the company is unable to pay its debts even if it is specific to only one creditor.

In such an example the receiver would act under the powers as set out in the charge document, which will usually include a right of sale. With a right of sale the receiver would realise the value of the charged asset and repay the creditor the amount of its unpaid debt. In this scenario the receiver would not be supervised by the Cayman Court and would owe their duties to the creditor rather than the company.

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?

(a) To protect its interests Sparrow could seek to appoint a receiver over the assets to which it has security, being the four boats, if the agreement governing the mortgages permit such (more information would be required to determine this). Sparrow could also serve a statutory demand on S&C and subsequently file a winding up petition for the repayment of the unsecured portion of its debt, being \$120 million.

(b) Roger Jolly could serve a statutory demand on S&C following the passing of the deadline for payment of the \$50M judgement and subsequently file a winding up petition. Alternatively, Roger Jolly could also seek recognition of the \$50M order by application to the Cayman Court.

The foreign judgements Reciprocal Enforcement Act (1996 Revision) does provide a statutory scheme for recognition and enforcement of foreign judgements in circumstances where the country from which the judgement originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands judgement. However to date the provisions of the Act have only been extended to judgements from the superior court of Australia.

Commented [BT17]: 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.

Given the limited application of the 1996 Act the enforcement of the judgement would likely be achieved by commencing a new action in the Cayman Court based upon the as a unsatisfied debt. Money judgements such as the one obtained by Roger Jolly are enforceable at common law.

Once a local judgement has been obtained, the full range of domestic enforcement remedies are available.

(c) Employees with outstanding wages could file a statutory demand against S&C and petition for the company to be wound up. Should the company enter official liquidation sums owed to employees are classed as preferential debts and are paid in priority to unsecured debts, taxes owed to the Cayman Islands government

(d) The Cayman Court has jurisdiction over S&C as S&C is a foreign company which is registered under Part IX, per section 91(d) of the Companies Act.

(e) S&C could put obtain a moratorium against proceedings commenced by Sparrow or Roger Jolly by going into provisional liquidation pursuant to section 104(3) of the Companies Act. When making the application S&C would need to explain to the Cayman court the purpose of the application, which would be the appointment of joint provisional liquidators in order to allow for the negotiation of a compromise or arrangement with Sparrow and/or Roger Jolly.

(f) Were S&C to be put into provisional liquidation the Cayman Court would determine which powers remain with the directors (Rackham family) and which vest in the provisional liquidators. The Rackham family could be relieved of their control entirely by the Court or the Court could determine that the Rackham family should retain certain powers or even the majority of their powers (referred to locally as 'light touch').

(g) The Cayman Court will consider the following at the convening hearing:

- Any issues of class composition;
- Any jurisdictional issues;
- The adequacy of the scheme documentation and notice.

Further, the Cayman Court must be satisfied that the scheme document and supporting explanatory statement contain all the information reasonably necessary to enable the scheme creditors (or other stakeholders as applicable) to make an informed decision on the proposed scheme.

The Cayman Court must approve the terms of the scheme before it becomes effective and will not do so unless satisfied that it is fair.

*** End of Assessment ***

43.5 / 50

Commented [BT18]: 1.5 marks. 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]: 1.5 marks

Commented [BT20]: 1 mark.

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.

Commented [BT22]: 1 mark

Commented [BT23]: 2 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.