



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.**
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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. Correct answer is 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?

Cayman Islands has ownership registers for real estate, intellectual property, aircrafts, motor vehicles, and ships. These registers are centrally maintained, and mortgages & charges can be registered. A third-party purchaser of those assets is deemed to have notice of any such interest and will therefore acquire the assets subject to the secured creditors interest. Further, one should also note that there is no public security registration regime in the Cayman Islands for other assets, so the creditor must therefore take adequate steps to ensure that it has sufficient control over an asset to prevent a third party from purchasing it. Thus, creditor should therefore review a company's register of mortgages and charges prior to disbursing the loan.

As per Section 54 of the companies Act the security interest should be entered in the register of mortgages and charges of the debtor's company. This register must be maintained by the company at its registered office in the Cayman Islands. If the company fails to update the register of mortgages and charges it does not mean invalidate any security interest. One should also note that registering the security interest in the company's register of mortgages and charges does not create priority. However, the register is open for inspection by any member of the company or creditor, so if registration is done this will put third-party on notice of the existence of a security.

Commented [BT12]: 3 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 Grand Court has powers to make orders in support of foreign bankruptcy proceedings and these are provided in the Part XVII of the Companies Act. Though, the Island has not implemented the UNCITRAL Model law on Cross- Border Insolvency, most of the principals are being followed in the Island. Further in Cayman Island there are no threshold tests for the grant of assistance nor there are automatic rights based on the centre of main interests (COMI) of the debtor. Here, the foreign representative must satisfy the Cayman court that it is appropriate for the court to exercise its discretion by granting the relief sought by them in their application.

Once, the application of a foreign representative is made, the Grand Court can provide ancillary orders to a foreign bankruptcy proceedings these are:

- Recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor.
- staying the enforcement of any judgment against a debtor.
- enjoining the commencement or staying the continuation of legal proceedings 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.
- ordering the turnover to a foreign representative of any property belonging to a debtor.

However, the Court can exercise the above ancillary orders at its discretion and for that the Grand Court is guided by matters which best assures an economic and expeditious administration of the debtor's estate, they are,

- Fair treatment to all holders of claims wherever they may be domiciled.
- Prevent the preferential or fraudulent dispositions of property
- Recognition and enforcement of security interests created by the debtor
- Protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding.
- Distribution of the debtor's estate amongst creditors substantially in accordance with the statutory order
- Non-enforcement of foreign taxes, fines and penalties; and
- Comity.

Commented [BT13]: 4 marks

Question 2.3 [maximum 3 marks]

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

In cross-border insolvency cases, the Grand Court adopts a co-operative approach to ensure an effective winding-up and towards the protection of interest of its creditors, wherever they are situated. The Cayman Island has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgement neither has UK extended its ratification of any treaties to the Cayman Islands by Order in Council. The Cayman Islands is also not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgement in Civil and Commercial Matters. However, the Foreign Judgement Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for recognition and enforcement of foreign judgements in circumstances where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgements. However, the provisions of the Act have only been extended to judgments from Superior Courts of Australia. This procedure is governed by Order 71 of the Grand Court Rules.

Also, for a foreign judgment to be enforceable it must be final, a money judgement and made after the 1996 Act was extended to the relevant foreign country. The enforcement of foreign judgement is also achieved by commencing a new action in the Cayman Islands based on the foreign judgement as an unsatisfied debt or other obligation. One should note that, money and non-money judgements (including declaratory judgements) are enforceable at common law. Here also there is mandatory requirement for enforcement of foreign judgement i.e., judgement should be final, the foreign court had jurisdiction over the debtor, the foreign judgement was not obtained by fraud, the foreign judgement is not obtained contrary to the rules of natural justice and the foreign judgement is not contrary to public policy of the Cayman Islands. Thus, once the local judgment has been obtained, the full range of domestic enforcement remedies are available.

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.

The Companies Law in the Cayman Islands does not specify the fiduciary or other duties imposed on company directors. The duties of directors are derived from English common law. At common law, the duties are categorised as fiduciary, skill, care and diligence. A company director is required to act in good faith, and he must act in the best interests of the company in all his company dealings and exercise his powers in the company's interests. As such, the directors are not personally liable for the debts, obligations or liabilities incurred by the company except for those which arise out of their negligence, fraud or breach of their fiduciary duty or by an action not within his authority and not ratified by the company.

The Section 147 of the companies Act deals with the fraudulent trading i.e., if the business was carried on the intention to defraud creditors or for any fraudulent purpose, a liquidator may apply for an order requiring that person to make contribution to the company's assets as the Court thinks proper. Though there is no statutory obligation to file for an insolvency and the Companies act also do not have a prohibition on wrongful trading, the directors can be made personally liable to the company for any losses which they cause to the company and if they act in breach of their fiduciary duty to act in the best interests of the company. Directors can be made personally liable to the company's losses which they caused to the company if they act in breach of their fiduciary duty to act in the best interest of the company.

When the company is in the official liquidation, the court appointed liquidators or creditors can hold its former directors accountable and seek financial damages. The official liquidator can also pursue the claim against the directors on behalf of the company for breach if their fiduciary duties.

The directors also can be held liable if they fail to take reasonable steps to minimise loss to creditors when they know there is no prospect of a company avoiding insolvency. Some of the order breaches are misappropriation of corporate assets, undervaluation of corporate assets in a preference i.e., preference payment to one creditor as opposed to another when insufficient monies are available to pay both (section 145 of the Companies Act) and transactions made at an undervalue (section 146 of the Companies Act), continuing to trade when there is little prospect of being able to pay when due and failure to inform creditors of insolvency.

Commented [BT15]: 8 marks

Question 3.2 [maximum 6 marks]

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

The receiver may be appointed in the Cayman Islands however it is not explicitly mentioned in the statutory provision dealing specifically with insolvency i.e., in Companies Act as well as in Companies Winding up Rules (2018). However, the Grand Court Rules do contemplate that receivers may be appointed by the Court for purpose of collecting money (for example Rent) or to carry out some other acts like execution of a contract or a document of title.

The Order 30 of Grand Court Rules (GCR) governs the appointment and duties of receivers. The order also mentions the remuneration to be paid to the receivers, if receiver requires any directions from the Court in can apply via written application.

Further Order 45 of GCR states that receiver may be appointed to enforce court orders for payment of money and Order 51 of GCR also provides the appointment of receiver by way of equitable execution.

However, in Cayman Island for the Segregated Portfolio Companies (SPCs) the law provides orders for receiver and receivership. An SPC is a regular company which is permitted to create separate portfolios for different assets and liabilities. Each portfolio is ring-fenced from the assets and liabilities contained in other portfolios and these companies are called Segregated Portfolio or SP. A receivership order may be made by the Grand Court if it is satisfied that the SP's assets to a particular portfolio of the company are likely to be insufficient to discharge the claims of creditors in respect of that portfolio. However, the receivership order must direct that the business and segregated portfolio assets of or attributable to a segregated portfolio must be managed by a receiver specified in the order for the purposes of orderly closing down the business and the distribution of the segregated portfolio assets to those entitled to have recourse thereto. The receivership order, however, may not be made if the segregated portfolio company is in process of being wound-up and if it ceases to be of effect upon commencement of the winding-up of the segregated portfolio company but without prejudice to prior acts of the receiver or his agent. One should note that when the application is made for receivership order, no suit, action or proceeding may be instituted against the segregated portfolio company for the segregated portfolio in which receivership order is being made, except by leave of court. Once the receiver is appointed the directors are relieved from their functions and powers in respect of that SP.

Receiver can also be appointed without any court involvement pursuant to rights in a security instrument. For example, a holder of a fixed or floating charge can appoint a receiver over the company's charged asset if a debtor default. The receiver will act under the powers set out in the charge document which may include right to sale the asset. The receiver will realise the value of the charged assets and repay the creditor the amount of its unpaid debt. In this case, the receiver is not supervised by the court and owes its duties to the creditors rather than the company.

Commented [BT16]: 6 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) Sparrow can take following actions to protect its interests:
 - i. Sparrow can file a bankruptcy petition against S & C to the Court given it owes more than KYD 40 to Sparrow and it can be seen by S & C act that it is unable to meet the engagements. If the court is satisfied of the evidence provided by Sparrow the court will make a provisional order that affair of the debtor shall be wound up and his property administered under the Act.
 - ii. On the secured loan i.e., US\$80 million which is secured by a mortgage over four of S & C's largest party boats, as per Section 142 of the companies Act, Sparrow is entitled to enforce its security without the leave of the Court and without reference to the liquidator. Given there is no stay on enforcement of security. However, for Sparrow to enforce these boats, the mortgage should need to be registered under its name in the register which is centrally maintained in Cayman Island.
 - iii. Deed/scheme of arrangement also can be entered between Sparrow and S & C if the deed is assented to by majority in number i.e., more than 50% representing 75% in value if the creditors of the debtor who has provided the debt.
- b) The Cayman Island has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgement neither has UK extended its ratification of any treaties to the Cayman Island, however the Grand Court adopts a co-operative approach to ensure an effective winding-up and protection of its creditors. Roger Jolly will have to commence new action in the Cayman Island based upon the foreign judgement as an unsatisfied creditor or any other obligation. This action will be conducted under the regular procedural regime for litigation in the Cayman Island. Also given the judgment is final and the foreign court has jurisdiction over the debtor the foreign judgement can be enforceable if local judgement is obtained by them.
- c) As per section 141 of the Companies Act, the sum due to employees will be paid in priority over other debt. Thus, in this case, if S & C is declared insolvent than the wages/salaries of employees will fall under the priority creditors and will be paid in

Commented [BT17]: 2 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 work out or alternatively as part of a court supervised process depending on its view of the likely recovery in each scenario.

Commented [BT18]: 1 mark. RJ can apply for recognition and enforcement of the arbitral award since the New York Convention has been extended to the Cayman Islands. The key point is that RJ has to apply to have the judgment recognised in the Cayman Islands. Once it does so, a range of enforcement remedies become available to it, including a charging order, writ of execution, examination of judgment debtor, attachment of earnings, garnishee proceedings and the ability to petition to wind up S&C (since RJ will be an unsecured creditor). If winding up petition has already been filed, there may be a moratorium preventing JR from taking any of the enforcement actions mentioned above in which case it will be left to file a proof of debt for its US\$50m as part of the official liquidation.

priority. However, the wages outstanding for four months preceding the date of provisional order will be considered as priority debt.

- d) The Grand Court of Cayman Islands has jurisdiction over S & C given it is registered in the Cayman Islands. The Grand Court can make winding up orders on the company's incorporated in the Cayman Island, incorporated elsewhere but subsequently registered in the Island and in respect of foreign companies which has property located in the Island, is carrying on business in the Island is the general partner of a limited partnership or is registered under Part IX i.e., an overseas company.
- e) Yes, as per Section 104 (3) of the companies Act, the company itself can make an *ex parte* application for a provisional liquidation, if the company is unable to pay its debt within the meaning of section 93 and company intends to present a compromise or arrangement to its creditors under section 86. The scheme of arrangement also can be entered between Sparrow and S & C wherein liabilities can be restructured, debt to equity can be proposed.
- f) If S & C is not into the provisional liquidation, then the Rackham family continue to manage the company. However, once the provisional liquidator is appointed, the Grand Court will determine which powers will remain with the directors and which will be vested in the provisional liquidators.
- g) The procedure for obtaining the approval for a restructuring of scheme of arrangement is governed by Order 102, rule 20 of the Grand Court Rules and Practice Direction 2/2010. After filing of the scheme petition, there is a three-stage process for schemes i.e.,
- i. an application must be made to the Grand Court for an order that meetings of creditors is to be convened for the purpose of approving the scheme. The scheme documents and other explanatory statements submitted must contain all the information for scheme creditors to make proper decision.
 - ii. approval or rejection of the scheme. For approval the scheme, it needs to be approved by majority in number i.e., more than 50% representing 75% in value if the creditors of the debtor who has provided the debt. If the ascending creditor's threshold is reached, then debtor can use the cramdown clause i.e., force dissenting creditors to accept the scheme of arrangement. Given in this case Sparrow is only creditor, this issue might not arise.
 - iii. if scheme is approved at the scheme meeting then application to the Grand Court to obtain approval of the scheme. The court will approve the scheme if it is within compliance and if all the creditors are fairly treated.

*** End of Assessment ***

44.5 / 50

Commented [BT19]: 1.5 marks. The unpaid employees can sue S&C for the unpaid debts (provided a winding up petition has not yet been filed). Alternatively, they can apply to wind up under section 92 - 94 Companies Act or apply to apply to appoint provisional liquidators under 104 (if they are concerned about mismanagement or wish to support a court-supervised restructuring). If an order is made that S&C be liquidated, the sums due to the employees rank as preferential debts (section 141) ahead of certain other creditors.

Commented [BT20]: 1 mark.

Commented [BT21]: 2.5 marks. And it provides a moratorium.

Commented [BT22]: 1 mark

Commented [BT23]: 2.5 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.