



**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?

It is possible for a creditor to register its security over an asset in the Cayman Islands, even after the company is placed into official liquidation or provisional liquidation. Under section 54 of the Companies Act, the security interest is required to be entered in the register of mortgages and charges of the debtor company and maintained by the company at its Cayman Islands registered office. The creditors may do so without the leave of the Grand Court and any reference to the company's liquidator.

**Commented [BT12]:** 1/2 mark for identifying that the question concerns section 54. Candidate may wish to re-read Study Guide on section 54 and regarding the central registers (real estate, vessels) and the effect of registration. And security CANNOT be registered once company is in liquidation.

**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 has not implemented the UNCITRAL Model Law or any international treaties for the reciprocal recognition. The criteria upon which the Court's discretion will be exercised is set out at Section 242 of the Companies Act. So, the court is to be treated as having a power to recognize and grant assistance to foreign proceedings and liquidators. If the circumstances justify its use, the power can be exercised by making suitable orders for the purpose of enabling the foreign court and its office holders to surmount the problems posed for a worldwide winding up of the company's affairs by the territorial limits of its powers. Under section 241 the Grand Court can provide the following forms of ancillary relief (a) recognising the right of a foreign representative to act in the Islands on behalf of, or in the name of, a debtor; (b) enjoying the commencement or staying the continuation of legal proceedings against a debtor; (c) staying the enforcement of any judgement against a debtor; (b) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and to produce documents to its foreign representative; and (e) ordering the hand-over to a foreign representative of any property belonging to a debtor.

**Commented [BT13]:** 4 marks

**Question 2.3 [maximum 3 marks]**

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

The legal framework for the recognition of foreign judgements in the Cayman Islands is provided by either:

- The Foreign Judgements Reciprocal Enforcement Act (1996 Revision), in circumstances where the country from which the judgement originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgements. The foreign judgement must be:
  - o Final
  - o A money judgement; and
  - o Made after the 1996 Act was extended to the relevant foreign country
- Or by commencing a new action in the Cayman Islands based upon the foreign judgement. The mandatory requirements for enforcement of a foreign judgement at common law are:
  - o The judgment is final;
  - o The foreign court had jurisdiction over the debtor;
  - o The foreign judgment was not obtained by fraud;
  - o The foreign judgment is not contrary to public policy of the Cayman Islands; and
  - o The foreign judgment was not obtained contrary to the rules of natural justice.

**Commented [BT14]:** 2.5 marks. Reference needed to be made to the limitations of the Act.

### 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.

There is no statutory obligation to file for insolvency and the Companies Act does not contain a prohibition on wrongful trading. However, the duties of directors and officers are ordinarily owed to the company as a whole, rather than to individual shareholders or creditors. This position changes once the company is insolvent, or potentially insolvent, at which point directors and officer must have regard to creditors' interests, as a whole, when discharging their duties.

As such, if in the course of a winding-up, it appears that any of the company's business has been carried on with intent to defraud the company's creditors, or for any fraudulent purpose, the Court can declare that the persons who were knowingly party to carrying on the business in that way are liable to make such contribution to the company's assets as the Court directs. So, directors can be personally liable for losses incurred by the company if they incur additional liabilities when they knew or should have known that there was no reasonable prospect of the company avoiding insolvent liquidation.

**Commented [BT15]:** 3 marks. The question is giving the candidate the chance to demonstrate their knowledge of case law and relevant sections of the Companies Act (e.g. 99, 145, 146, 147)

#### Question 3.2 [maximum 6 marks]

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

The receiver will not be supervised by the court and owes its duties to the creditors rather than the debtor company. He will act under the powers set out in the charge document (disclaiming a right of sale). The role of the receiver will generally be to release the value of the charged asset and repay the creditor the amount of its unpaid debt. |

**Commented [BT16]:** 2 marks. But a receiver can be appointed by the Court. And what about SPCs?

**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 has lent S&C \$200 million of which \$80 million are secured by a mortgage over four of S&C's largest party boats. As a secured creditor whose debt is more than the value of his security (only \$80 million secured over the \$200 million), Sparrow may prove in the liquidation for the unsecured balance. For the secured part of the loan, Sparrow is entitled to enforce its security even after the company is placed into official liquidation. Sparrow may do so without the leave of the Grand Court or any reference to S&C's liquidator. As a movable property, a fixed charge gives Sparrow the right to take possession of the 4 party boats and sell them.

**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.

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

**Commented [BT18]:** 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.

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



Per section 141 of the Companies Act, in the case of an insolvent company, the sums due to employees are paid in priority to all other debts.

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

Based on the Section 91 of the Companies Act, the Grand Court has jurisdiction to make (winding up) orders in respect of companies which are incorporated in the Cayman Islands. As a company registered in the Cayman Islands, the Cayman Islands Court have jurisdiction over S&C.

**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 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.

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

S&C may enter in an arrangement with its creditors to set up a scheme of arrangement which is a court approved compromise. A scheme may for example restructure liabilities or reorganise share capital.

**Commented [BT20]:** 1 mark.

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

If the company is not in provisional liquidation, existing management will continue to manage the company. Once the provisional liquidators are appointed, the Grand Court will determine which powers remain with the directors and which vested in the provisional liquidators. This is called a "light touch" provisional liquidation.

**Commented [BT21]:** 1 mark. 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.

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

For a proposed scheme to be approved, the Cayman Islands Court will see if a majority in number representing at least 75% in value of the creditors (or class of creditors) must agree to the scheme.

If the necessary majorities are obtained, the scheme can proceed to the sanction hearing. The grand Court must approve the terms of the scheme before it becomes effective and will not do so unless that it is fair.

**Commented [BT22]:** 1 mark

**Commented [BT23]:** 1.5 marks. Factors include:  
1. The meeting was properly convened (in accordance with the court's initial order)  
2. Proposal approved by over 50% in number representing 75% or more in value of the creditors (or class of creditors) present and voting  
3. whether the majority of Stakeholders voting acted in good faith, were a fair representation of the relevant Class  
4. that the Scheme is better than the result would be if the company were wound up, and  
5. that an intelligent and honest member of the Class would agree that the Scheme should be approved.

**\* End of Assessment \***

**29 / 50**