



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.

In respect of a real estate property, vessel, aircraft, motor vehicle or intellectual property there are centrally maintained ownership registers where security can be registered. This puts any third party on notice of the creditors interest.

For other assets, those not subject to a centrally maintained register, the company should maintain a register of charges, which any purchaser or lender should review as part of their due diligence. If the company has not maintained a proper register this does not invalidate the security.

Ensuring a security is registered does not create a priority, unlike in England, the location of the asset and the relevant law will determine the priority status.

Commented [BT12]: Registration does create priority in the central registers (real estate etc) but entry in the ROM &C does not create priority. 2 1/2 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 Grand Court in the Caymans has the power to assist in foreign bankruptcy proceedings under Part XVII of the Companies Act.

The Cayman Islands have not adopted the Model Law; however, many of the principles are followed.

Any foreign representative must satisfy the Grand Court that it is appropriate for it to exercise its powers and grant the relief sought. The Grand Court will consider a number of matters before granting the relief sought to ensure the most efficient administration of the estate, which include:

Commented [BT13]: 4 marks

- The fair treatment of all creditors whether they are resident in the Cayman Islands or not;
- Ensuring Cayman Island creditors can prove in the foreign proceedings;
- Protecting against voidable transactions;
- Distribution of assets in the correct order of priority;
- Recognition and enforcement of security;
- 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 Cayman Islands are not party to any treaty for the recognition of foreign judgments and it is not a signatory to the Hague Convention.

There is a statute in place in the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) which provides a statutory scheme to recognise and enforce foreign judgements if the originating country reciprocates in respect of the recognition and enforcement of Cayman Islands judgments.

There is limited statute for the recognition and enforcement of foreign judgments and therefore the common law route is often taken, whereby the outstanding foreign judgment is used as an unsatisfied debt and a new action is taken in the Cayman Islands in respect of the unsatisfied debt.

Commented [BT14]: 2 marks. Greater detail required for full marks - why is the Act limited in scope? what are the mandatory criteria that must be satisfied at common law?

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.

Unlike in England, where, if a director knew or ought to have known that its company was insolvent or likely to become insolvent, they must take steps to protect the interests of creditors i.e. by ceasing to trade and filing for insolvency, there is no such provision in the Cayman Islands.

Whilst there is no provision for wrongful trading in the Cayman Islands, it is still possible for the directors to be held personally liable for breach of fiduciary duties.

The fiduciary duty of a Cayman Islands' director derives from the Companies Act and includes the duty of a director to act in the best interests of the Company. This was tested in *Prospect Properties vs McNeill* where the Grand Court found that if the company were insolvent the director's duties would extend to having regard for the interests of its creditors.

In addition to a director being personally liable for a breach of fiduciary duty and ordered to pay a contribution to the estate, there are a number of clawback provisions available to a liquidator in the Cayman Islands, as follows:

1. Voidable preference

Under section 145 CA a voidable preference is a payment to a creditor of cash or an asset if:

- The payment takes place within six months of the commencement of the liquidation and whilst the company was cashflow insolvent; and
- The main intention behind the transaction was to prefer that creditor.

Both elements must be satisfied unless the transaction is to a connected party, at which point the intention to prefer is assumed.

2. Avoidance of disposals at undervalue

Under section 146 CA the liquidator can claim a disposal at undervalue if they can prove that:

- The transaction was at an undervalue; and
- The intention was to defraud creditors by removing the asset from the estate.

The liquidator can apply to have the transaction set aside. However, the burden of proof is on the liquidator and the claim must be brought within six years of the transaction occurring.

3. Fraudulent trading

Under section 147 CA if a liquidator can prove that the business of the company intended to defraud creditors or the business of the company had a fraudulent purpose, it can make an application to the Grand Court for contributions to the estate from those individuals involved in the fraud.

Commented [BT15]: Good, 7 marks. A bit more detail and slightly wider discussion (s.99, s.135) would have merited full marks.

Question 3.2 [maximum 6 marks]

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

This statement is incorrect, despite the fact that there are no statutory provisions in the Companies Act and the Companies Winding-Up Rules, the Grand Court Rules ('GCR') do provide for the role of a receiver. There are a number of provisions in the GCR which state the purpose of a receiver and their general duties.

The charge document may give a creditor a right to appoint a receiver without any involvement from the Grand Court. The powers of the receiver would be contained within the charge document itself but will generally provide the power of sale of the asset. This can be a quicker and cheaper route for a creditor taking action.

There is also a special vehicle in the Cayman Islands known as a Segregated Portfolio Company ('SPC'), in which the assets and creditors are segregated into silos and an SPC can be made up of a number of these silos.

A receiver may be appointed over one of these silos, without affecting the rest of the SPC. A receiver would likely be appointed if:

- The assets of that silo were insufficient to meet its liabilities i.e. insolvent.
- The orderly winddown of the silo and distribution of its assets.

A receiver cannot be appointed if the SPC is in liquidation. Any receivership of a silo will be terminated if the SPC goes into liquidation.

Given the above, it is my view that receiverships to have a significant role to play in the Cayman Islands. |

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) What action can Sparrow take to protect its interests?

Sparrow has lent S&C \$200m, of the \$200m, \$80m is secured by a mortgage over 4 of S&C's party boats/

S&C has defaulted on its monthly repayments.

Sparrow should ensure that its charges over the boats are registered on the centrally maintained register.

The facts do not tell us whether Sparrow took any other additional security over the company's assets to secure the entirety of the loan, assuming it did they should ensure their interests are registered on the company's register of charges.

If Sparrow does not believe that the company is viable and it wants to protect its interests, it can enforce its security over the vessels (party boats), and appoint a receiver to sell the assets using the proceeds to partially meet the liabilities under the loan.

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

Roger Jolly has an award from the International Chamber of Commerce for \$50m.

Roger Jolly can apply to the Grand Court under the GCR to obtain a local judgment which will allow Roger Jolly access to the domestic Cayman Island enforcement remedies.

The judgment obtained from the ICC meets the mandatory requirements for enforcement of a foreign judgment as:

- It is final;
- The ICC had jurisdiction over S&C;
- There was no fraud involved in obtaining the judgment;
- The judgment does not appear to be against the public policy in the Cayman Islands; and
- The judgment was not obtained against the laws of natural justice.

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

An unpaid employee of the company ranks as a preferential creditor under section 142 CA.

As a creditor the employee can petition to wind-up the company, the grounds for winding-up the company would be that S&C was unable to pay its debts.

The employee could serve demand on S&C for payment, if the amount is over KYD100 and remains unsatisfied for 21 days S&C will be deemed unable to pay its debts.

Commented [BT17]: 1 mark. Examiner was looking for candidate to reference ability of secured creditor to enforce its security (which should be centrally registered given it concerns vessels) outside of liquidation proceedings and without leave of the court (s.142). Also, that S&C cannot pay its debts (s.92 and 93) such that Sparrow has standing as an unsecured creditor to petition to wind up S&C. It may therefore choose to help S&C restructure via a work out or alternatively as part of a court supervised process depending on its view of the likely recovery in each scenario.

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

Commented [BT19]: 2 marks

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

S&C is registered in the Cayman Islands, The Grand Court of Cayman has jurisdiction to make winding-up orders against companies which are registered in the Cayman Islands, even if they are incorporated elsewhere.

Commented [BT20]: 1 mark.

e) S&C could consider making an application for provisional liquidators to be appointed. This would provide S&C with some breathing space from its creditors via an automatic stay, whilst it tries to draw up a compromise agreement with its creditors.

Commented [BT21]: 3 marks.

S&C can make an application under section 104(3) CA on the grounds that:

- S&C are unable to pay its debts; and
- S&C intends to present a compromise agreement to its creditors.

f) The Rackman family can continue to play a role in the running of S&C during the restructuring process, this would be a 'light-touch' provisional liquidation.

In a 'light-touch' process the existing management continue to run the company under the supervision of the provisional liquidator and the Grand Court.

Commented [BT22]: 1 mark

g) Assuming S&C are looking to restructure via a Scheme of Arrangement, in the first hearing – the convening hearing - the Grand Court will consider the following:

- The class composition for voting purposes;
- Any relevant jurisdictional issues; and
- The documentation and whether it is sufficient to allow the creditors to make an informed choice.

Assuming that S&C obtain Court approval to hold the meetings and the Scheme is approved at those meetings, S&C would then make a further application to Court to sanction the Scheme. At the sanctioning hearing, the Court will ensure that the meetings were convened correctly, and the meetings have approved the Scheme given the required majorities. The Court will want to ensure that any creditor acting in a logical manner would approve the Scheme prior to sanctioning.

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 ***

41 / 50