



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?

Pursuant to Section 54 of the Companies Act, security interests shall be entered in the register of mortgages and charges of the company and said register must be maintained by the company at its registered office in writing. Failure of a company to update the register of mortgages and charges will result in a penalty to the director, manager, or officer of the company, but it does not, invalidate any security interests.

The act of registration serves as notice to other parties that the security exists as the register is available for inspection by members and creditors but does not in itself create priority.

There are specific assets ownership registers that have a public security registration regime such as in the case of real estate, vessels, aircraft, motor vehicles and intellectual property. A purchaser of these assets is deemed to have notice of any security interest and knowingly purchased such asset with a security charged over the asset.

Commented [BT12]: 3 marks

For other assets, it is for the creditor to take measures to review the company's register of mortgages and charges to ensure they have control over an asset to prevent a third party from purchasing it, prior to making any loan.

The law governing the priority and perfection of security is dependent on where the property is located.

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?

Pursuant to Section 241 of the Companies Act, the Cayman Islands Grand Court may grant ancillary orders to a foreign bankruptcy proceeding for the purposes of -

- (a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
- (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

- (c) staying the enforcement of any judgment against a debtor;
- (d) 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
- (e) ordering the turnover to a foreign representative of any property belonging to a debtor.

While UNCITRAL Model Law is not adopted in Cayman Islands, its principles are considered. In determining whether to make an ancillary order under Section 241, pursuant to Section 242 of the Companies Act, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with -

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

Commented [BT14]: 3 marks

As there is very limited application of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) – which applies only for judgements from the Superior Courts of Australia and Cayman Islands has not adopted the UNCITRAL Model Law, a recognition of a foreign judgment would mean that a new suit must be initiated in Cayman Islands using the foreign judgment as unsatisfied debt.

At common law there are 5 requirements that must be fulfilled:

1. The judgment is final;
2. The foreign court had jurisdiction over the debtor;
3. The foreign judgment was not obtained by fraud;
4. The foreign judgment is not contrary to public policy of the Cayman Islands; and
5. The foreign judgment was not obtained contrary to the rules of natural justice.

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.

While there is no statutory prohibition on insolvent trading, directors still owe fiduciary duties to the company and are to act in the best interests of the company. If it is found that the

directors are in breach of their fiduciary duties, the directors can be made personally liable. In the case of *Prospect Properties v McNeil* the Grand Court held that for an insolvent company, the directors have a duty to act in the interests of its creditors and not perform acts that will put the company in a position where it is less able to meet its obligations to the creditors (i.e. creditors cannot be made worse off) due to the acts of the director.

The official liquidators of a company can pursue claims against the directors on behalf of the company for breach of their fiduciary duty.

Other mechanisms for claw-backs that are available are as follows:

1. Avoidance of property dispositions

Pursuant to Section 99 of the Companies Act, when a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void.

Should the directors attempt to dispose of any property after the deemed commencement of the winding up of the company (the application date), it is deemed void, and any such transactions may be unwound.

2. Voidable preference

Pursuant to Section 145 of the Companies Act –

- (1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts as they fall due, with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.
- (2) A payment made as aforesaid to a related party of the company shall be deemed to have been made with a view to giving such creditor a preference.
- (3) For the purposes of this section a creditor shall be treated as a "related party" if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions.

If a director made a transfer of property or payment to a creditor when the company is insolvent and with the intention to prefer the creditor (improve the creditors position above other creditors of the same type) and not for any other purpose as required to maintain the business as a going concern (keeping the lights on), it is deemed as a voidable preference and can be unwound. Likewise, a payment to a related party is also deemed as a preference.

3. Avoidance of dispositions made at an undervalue

Pursuant to Section 146 of the Companies Act –

(1) In this section and section 147 –

- (a) "**disposition**" has the meaning ascribed in Part VI of the *Trusts Act (2021 Revision)*;
- (b) "**intent to defraud**" means an intention to wilfully defeat an obligation owed to a creditor;
- (c) "**obligation**" means an obligation or liability (which includes a contingent liability) which existed on or prior to the date of the relevant disposition;
- (d) "**transferee**" means the person to whom a relevant disposition is made and shall include any successor in title; and

- (e) “undervalue” in relation to a disposition of a company’s property means —
- (i) the provision of no consideration for the disposition; or
 - (ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

(2) Every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator.

(3) The burden of establishing an intent to defraud for the purposes of this section shall be upon the official liquidator.

(4) No action or proceedings shall be commenced by an official liquidator under this section more than six years after the date of the relevant disposition.

(5) In the event that any disposition is set aside under this section, then if the Court is satisfied that the transferee has not acted in bad faith —

- (a) the transferee shall have a first and paramount charge over the property, the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings; and
- (b) the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith).

Any disposition of assets at an undervalue – amount significantly less than what the asset is worth by the director may be voided and unwound on the application of the liquidator within 6 years of the disposition date.

4. Fraudulent trading

Pursuant to Section 147 of the Companies Act –

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section.

(2) The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned in subsection (1) are liable to make such contributions, if any, to the company’s assets as the Court thinks proper.

If it is found that the director has been carrying on business with the intent to defraud, then the director can also be made personally liable for the losses incurred on application by the liquidator to court. The Court will decide what contributions by the director will be proper.

Commented [BT15]: 9 marks

Question 3.2 [maximum 6 marks]

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

In any insolvency scenario, in Cayman Islands, a secured creditor may still appoint a receiver to realize their security in the event of a default. Although the roles of receivers are not clearly stated in the insolvency statutes (i.e. the Companies Act and Court Winding Up Rules (2018)), the Grand Court Rules (GCR) do allow for receivers appointment to collect money or to carry out other act that may be required. Specifically, pursuant to GCR order 30 governs the role of receivers, order 45 provides for receivers’ appointment to enforce judgments for payment of money and order 51 provides for appointment of receivers by way of equitable execution.

Despite the above, receivers may be appointed for Segregated Portfolio Companies (“SPC”). The Grand Court may grant the order for appointment of receivers if it is satisfied that the segregated portfolio (“SP”) assets for that portfolio is insufficient to discharge the claims of creditors of that SP. The receivership order would direct that the SP be managed by a receiver to achieve the orderly closing down of the SP and a distribution of the assets attributable to the SP to parties that have a valid claim against the SP.

If the SPC is already in the process of winding up, the Court will not grant a receivership order. Likewise, the receivership order will cease to be of effect upon commencement of winding-up of the SPC, but without prejudice to prior acts of the receiver or their agents.

When the application has been made for a receivership order for an SP, no action can be commenced or continued against the SPC in relation to the SP, except with the leave of Court. While the receivership order is in effect, the directors’ functions and powers relating to the SP has ceased and is transferred to the receiver.

Receivership offers an alternative course of action for certain creditors as mentioned above, secured creditors may appoint a receiver to recover their security. Receivers can be appointed without an application to court pursuant to rights in a charge document. The receiver will act under the powers set out in the security instrument, which will typically includes a right of sale. The receiver will sell the security and distribute the proceeds to the creditor. In this case, the receiver’s duty is to the creditor and their actions are not supervised by the Court. |

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?

Sparrow, given they are a secured creditor, can enforce against their security and appoint a receiver for the 4 vessels totalling USD 80 million. As for the remaining USD120 million, depending on the facility agreement that Sparrow has with S&C, Sparrow may demand for additional collateral be given to Sparrow by S&C or demand accelerated payment of all sums due (the full USD120 million, if not all due). If a demand is issued to S&C for payment of all sums due, and if S&C has failed to pay the full sum, secure the sum demanded or compound the sum demanded within 3 weeks, Sparrow may make an application for the winding-up of S&C.

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?

As Roger Jolly's ICC arbitration award is an order granted in London court, Roger Jolly will need to have the foreign judgment recognized in Cayman Islands first to enforce on its claims in Cayman Islands. Once Roger Jolly obtains the local recognition order, they may issue a demand like Sparrow above and if the sums are not satisfied in 3 weeks, Roger Jolly may make an application for the winding-up of S&C. Alternatively, if S&C has any assets in the United Kingdom ("UK"), Roger Jolly may seek enforcement action to seize the assets in UK for e.g. vessels in the UK waters.

Commented [BT18]: 1.5 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.

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

The employees may issue a demand to S&C for their outstanding salaries due, following the 3 weeks, similar to (a) and (b) above, they may apply for a winding-up of S&C. In an official liquidation, the sums due to employees rank as a preferential debt, pursuant to section 141 of the Companies Act.

Commented [BT19]: 2 marks

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

As S&C is a company incorporated in the Cayman Islands, pursuant to section 91 of the Companies Act, the Grand Court of the Cayman Islands does have jurisdiction to make winding up orders in respect of S&C.

Commented [BT20]: 1 mark.

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

The most common route for protection and restructuring of a company is an application to place the company into Provisional Liquidation ("PL"). During the application, S&C will have to explain to court the purpose of the PL is to provide breathing space and protection for S&C to restructure and propose a compromise or arrangement. When S&C is in PL there is an automatic moratorium and stay on proceedings against the company and no creditor may commence any further action against the company except with the leave of court. During the PL, the company may with the assistance and supervision of the provisional liquidators and the court, propose a restructuring plan to the creditors and/or shareholders.

Commented [BT21]: 3 marks

S&C can also consider the appointment of a Restructuring Officer pursuant to the new Section 91B as proposed by the amendment bill. The same effect of an automatic moratorium will also be granted for such application, similar to that of a PL application.

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

For a "light touch" provisional liquidation, the management may remain in control, subject to oversight by provisional liquidators and the Grand Court. Depending on the case, the Rackham family may also be replaced by the provisional liquidators in managing the day-to-day operations of S&C.

If the company is not in provisional liquidation, the existing management will continue to manage the company, or the company may be managed by the restructuring officer if so appointed.

Commented [BT22]: 1 mark

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

The Courts will consider the adequacy of the class composition - if the creditors in each class have similar interests, jurisdiction concerns, the adequacy of the restructuring proposal documentation and notice. The Courts must be satisfied that the restructuring proposal is complete and sufficiently detailed for creditors and shareholders to make an informed decision.

Any restructuring proposal via a scheme must be approved by more than 50% in number of creditors and/or shareholders representing at least 75% in value of creditors and/or shareholders present and voting. The Court will also consider whether the regulations as set out in the convening orders has been complied with and if the majority's interests fairly represent their respective classes, whether the arrangement is such that an intelligent, honest member of the class might reasonably approve.

Commented [BT23]: 3 marks

In summary, if the proposal is unfairly prejudicial to any parties, the Court may not grant sanction to the scheme / restructuring proposal.

*** End of Assessment ***

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