



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.

Commented [BT7]: Correct. 1 mark.

(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.

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.

Commented [BT8]: Correct. 1 mark.

(d) Sums due to depositors (if the company is a bank).

(e) Unsecured debts which are not subject to subordination agreements.

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.

Commented [BT9]: Correct. 1 mark.

(e) The company is carrying on regulated business in the Cayman Islands without a license.

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?

Yes, a creditor can register its security over an asset in the Cayman Islands. Regardless of where the asset is located, it is necessary under Section 54 of the Companies Law that a security interest created must be registered in the register of mortgages and charges of the company which is to be maintained by the company at its registered office in the Cayman Islands. Priority is not created upon registration but the register is open for inspection so anyone viewing the register will be aware of the existence of securities.

Commented [BT12]: 1 1/2 marks. Reference should have been made to the central registers and the effect of them.

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?

Yes, the Cayman Islands Grand Court has power to assist in foreign bankruptcy proceedings pursuant to the Companies Act, specifically Part XVII - International Cooperation (Section 240 to 243). A foreign representative of a foreign bankruptcy proceeding can make an application to the court to make an ancillary order for the following purposes:

- 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.

In exercising its jurisdiction in making such an ancillary order, 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.

Cayman Islands has enacted the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) ("the Act"). However, the Act requires reciprocal treatment for the enforcement of Cayman Islands judgements in the country where the foreign judgement originates from. At present, the Act only extends to judgments made by the Superior Courts of Australia and its External Territories.

As such, most recognition of foreign judgements require commencing a new action under common law. The Grand Court of the Cayman Islands may enforce a judgement that meets the following requirements:

- a) the foreign judgment was given by a court of competent jurisdiction in accordance with Cayman Islands conflicts of law rules;
- b) the foreign judgment is final and conclusive; and
- c) the foreign judgment has not been obtained by fraud, in opposition to natural justice or in contravention of the public policy of the Cayman Islands.

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.

Although there are no statutory prohibitions on insolvent trading, directors can be made personally liable for any losses the company has made under their direction if it is due to a breach in their fiduciary duty to act in the best interest of the company. It was held in *Prospect Properties v McNeill* [1990-91 CILR 17], that "where a company is insolvent, the directors' duty to act in the best interest of the company requires them to have regard to the interest of its creditors." A court appointed liquidator can seek to make directors of an insolvent company personally liable for breach of their fiduciary duty through common law.

While there are no statutory prohibitions on insolvent trading, the Companies Act provides other avenues to claw-back certain payments such as avoidance of property dispositions, voidable preference, avoidance of dispositions made at an undervalue, and fraudulent trading.

Pursuant to section 99 of the Companies Act, once a petition has been presented to the court for the winding up of a company, any disposition of the company's property or any transfer or alteration of shares are void, unless otherwise directed by the Court. The liquidator is entitled to the appropriate relief to be decided by the court, such as return of the asset or proceeds from the disposition.

Section 134 of the Companies Act states that any persons who was or is an officer of a company can be liable on conviction if he commits any of following offences, in the twelve months preceding the commencement of a winding up, with an intent to defraud a company's creditors or contributories:

- a) concealed any part of the company's property to the value of ten thousand dollars or more or concealed any debt due to or from the company;
- b) removed any part of the company's property to the value of ten thousand dollars or more;
- c) concealed, destroyed, mutilated or falsified any documents affecting or relating to the company's property or affairs;

- d) made any false entry in any documents affecting or relating to the company's property or affairs;
- e) parted with, altered or made any omission in any document affecting or relating to the company's property or affairs; or
- f) pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company's business).

Pursuant to Section 145 of the Companies Act, any transfer of property or any payment made to a creditor, in the six months preceding the commencement of a liquidation, at a time when the company is unable to pay its debts with a view of giving that creditor preference over other creditors shall be deemed to have been made with a view to prefer that creditor. The liquidator can apply for appropriate relief from the court if they are able to provide sufficient proof that the payment was indeed made to prefer a creditor.

Pursuant to Section 146 of the Companies Act, "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." The burden of establishing an intent to defraud is on the liquidator.

Section 147 of the Companies Act provides that if in the course of a liquidation, it appears that any business was carried on with the intent to defraud creditors, the liquidator may apply to the Court for a declaration that the knowing parties to the carrying of such business make contributions to the company's assets as the Court thinks proper.

Commented [BT15]: 9 marks

Question 3.2 [maximum 6 marks]

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

Although receiver appointments are not made pursuant to provisions relating to insolvency, they provide a valuable alternative to creditors for recovery of debts without relying on standard methods of recovery under the formal insolvency regime of Cayman Islands, such as corporate liquidation.

A judgement creditor who is concerned the debtor may not be able to satisfy the judgement may make an application to the Grand Court of the Cayman Islands for the appointment of a receiver. The Grand Court may make an order appointing a receiver whenever it deems it just and equitable. Receivers appointed by the court may have powers similar to liquidators, such as rights to identify, investigate and recover specified property and collecting money for distribution. Judgement creditors may find this to be a more cost-effective and quicker method of securing assets rather than seeking to wind-up a debtor that is unable to satisfy their judgment.

In relation to segregated portfolio companies ("SPCs"), which are legal entities established for the establishment of internal portfolios, all of which retain their own legal entitlement to their respective assets and liabilities, separate from the assets and liabilities of the company's ordinary account, appointment of receivers or receivership orders are provided for by statute. On application to the Grand Court and if the Grand Court is satisfied that the SPC's assets are insufficient to discharge the claims of creditors, a receivership order may be made. A receivership order must direct that the receiver manages the SPC for the purposes of:

- a) the orderly closing down of the business, or attributable to, these SPCs; and
- b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto.

While a receivership of a SPC may not be appointed pursuant to provisions relating to insolvency, a receivership order made by the court is to recover assets of an insolvent debtor for distribution to creditors, similarly to the process of liquidation.

Commented [BT16]: 4.5 marks. Good but don't forget receivers appointed pursuant to a security instrument.

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?

As USD 80 million of the loan given by Sparrow to S&C is secured by a mortgage over 4 of S&C's party boats, Sparrow can choose to enforce their mortgage security. If the vessels are located in Caymans Islands, Sparrow is entitled to exercise the statutory power of sale arising under the Merchant Shipping Law, when all or any part of the sum secured under the mortgage becomes due. In order to take possession of the vessels, Sparrow may require a court order. This will largely depend on the cooperation of the S&C in delivering the vessels. With regards to the amounts that are not secured, Sparrow can seek to commence an action in court for a judgement sum that can be enforced against S&C.

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.

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

As the ICC has ruled that S&C pay damages to Roger Jolly, Roger Jolly can seek to have the judgement recognised and enforced through commencing a new action in the courts of Cayman Islands as an unsatisfied debt. The full range of domestic enforcement remedies will be available to Roger Jolly upon obtaining a local judgement.

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.

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

Pursuant to Section 31 of the Labour Act, an employee who not been paid his wages shall be entitled to recover by action in the appropriate Court so much of his wages, exclusive of sums lawfully deducted, with interest at the rate of ten per cent per annum.

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

Yes, the Cayman Islands Court has jurisdiction over S&C as their registered office is in the Cayman Islands. The Cayman Islands is a creditor-friendly jurisdiction and creditors are treated equally when commencing an action or seeking remedies whether they are based in Caymans Islands or elsewhere.

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

Yes, S&C can protect itself when seeking to restructure by applying for the appointment of provisional liquidators. Pursuant to Section 104(3) of the Companies Act, a company that intends to present a compromise or arrangement to its creditors, may make an application for the appointment of provisional liquidators. The appointment of provisional liquidators gives the protection of a statutory moratorium that prevents actions or proceedings from being commenced or continued against the company without leave of court. However, this does not prevent a secured creditor from enforcing their security which allows Sparrow to enforce their mortgage security notwithstanding any appointment of provisional liquidators.

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

This will depend on the route S&C intends to take when proposing their restructuring plan. If they intend to appoint provisional liquidators, the existing management can continue subject to the supervision by the provisional liquidators and the court. The court can also determine the extent of the management's powers in the order appointing the provisional liquidators. If S&C do not appoint provisional liquidators, control of the company rests with the existing management.

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

A company proposing a restructuring scheme to its creditors must first make an application to Court to convene a meeting of members and creditors to approve the scheme. If the scheme is approved at the meeting, the company must make a subsequent application to the court to obtain approval/sanction the scheme. The court will take the following into consideration before approving the proposed scheme:

- a) That the directions of the Court and statutory provisions were complied with;
- b) That the majority fairly represented the class, acted in good faith and are not coercing the minority; and
- c) That the scheme is such that an intelligent and honest man who is a member of the class concerned might reasonably approve it.

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.

Commented [BT20]: 1 mark.

Commented [BT21]: 3 marks

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.

*** End of Assessment ***

42.5 / 50