



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 to register mortgages and charges for real estate, ships, aircraft, motor vehicles and intellectual property. 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. No other assets have a public security registration regime in the Cayman Islands. Registering a security interest in the company's register of mortgages and charges does not create priority, however, as the register is open for inspection by any member of the company or creditor the third parties are put on notice of the existence of a security by the registration.

Commented [BT12]: 2 1/2 marks. Does registration in the central registers (vessels, real estate) create priority?

Pursuant to section 142 of the Companies Act, a creditor with security over an asset of a company is entitled to enforce its security before or after a company is placed into liquidation. This may be done without leave of the Grand Court or reference to the liquidator.

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, although regard is had to the principles. Part XVII of the Companies Act outlines the Grand Court's powers to make orders in support of foreign insolvency proceedings.

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 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 to produce documents to its foreign representative; and (e) ordering the hand-over to a foreign representative of any property belonging to a debtor.

The Grand Court is guided by matters which will best assure an economic and expeditious administration of the debtor's estate in determining whether to make the ancillary orders. These are consistent with: (a) the just treatment of all holders of claims, wherever they are domiciled, in accordance with established principles of natural justice; (b) the protection of

claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings; (c) the prevention of preferential or fraudulent dispositions of property in the debtor's estate; (d) the distribution of the estate among creditors substantially in accordance with the statutory order of priority; (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 (mutual recognition and co-operation concerning legal decisions).

Commented [BT13]: 4 marks

Question 2.3 [maximum 3 marks]

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

The Cayman Islands hasn't entered into any international treaties for the reciprocal recognition of foreign judgments. Recognition and enforcement of foreign judgements is provided under the statutory scheme of the Foreign Judgment Reciprocal Enforcement Act for countries from where the judgment originates assures substantial reciprocity of treatment of enforcement of Cayman Islands judgments. As the Foreign Judgments Reciprocal Enforcement Act has limited application, the enforcement of foreign judgments is usually achieved by commencing a new action based upon the foreign judgement as an unsatisfied debt or other judgment under The Grand Court Rules.

Commented [BT14]: 3 marks

At common law there are 5 requirements (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.

Whilst the Companies Act does not contain a prohibition on insolvent trading, directors can be made personally liable to the company for losses which they caused whilst acting in breach of their fiduciary duty to act in the best interests of the company.

For example, the Grand Court held in the case *Prospect Properties v McNeill* that where a company is insolvent, the directors' duty to act in the best interests of the company requires them to have regard to the interests of its creditors. An official liquidator can pursue claims against the directors on behalf of the company for breach of the directors' fiduciary duties.

Pursuant to section 147 of the Companies Act if the insolvent trading was carried on with the intent to defraud creditors or for other fraudulent purposes a liquidator can apply for an order requiring any knowing parties to the conduct to make contributions to the company's assets as the Court thinks proper.

If a disposition is considered to be a voidable preference under section 145 of the Companies Act then the liquidator may apply to the Grand Court to order the creditor to return the asset and prove in the liquidation for the amount of its claim. To be considered voidable, the disposition must have occurred in the six months before commencement of the liquidation and

at a time when its unable to pay its debts; and the directors dominant intention was to give a creditor preference over another

Commented [BT15]: Some good points but greater detail, and other statutory provisions, needed to be discussed to earn more marks. 6 marks.

Question 3.2 [maximum 6 marks]

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

Although receivers are not mentioned in the statutory provisions specifically dealing with insolvency, the Companies Act and CWR, the Grand Court Rules (GCR) outline that receivers may be appointed by the Court for the purposes of collecting money or to carry out another act e.g. the execution of a contract or document of title.

Under the GCR, order 30 governs the appointment and duties of receivers, order 45 states receivers may be appointed to enforce court orders for the payment of money and order 51 also provides for the appointment of receivers by way of equitable execution.

Receivership can provide an alternative course of action for certain creditors as they can be appointed without court involvement pursuant to the rights in a security instrument and will act under the powers set out in the charge document.

Receivership and receivership orders are also specifically provided for by statute in respect of a Segregated Portfolio Company (SPC) being a type of Cayman Islands legal entity.

Commented [BT16]: 4 marks. Good but a little light on detailed explanation.

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) 80 million of Sparrow's loan to S&C is secured by a mortgage and the other 120 million is unsecured. Therefore, pursuant to section 142 of the Companies Act, Sparrow is entitled to enforce their security for the 80 million without leave of the Grand Court. If S&C does go into liquidation then Sparrow can still enforce their security without reference to the liquidator, however, only for the 80 million portion. Sparrow must prove the 120 million unsecured balance in a liquidation.

(b) As the ICC has already ruled that S&C must pay damages to Roger Jolly by mid-February, Roger Jolly can wait until this time to see if the damages are paid or as a creditor, file a winding-up petition.

(c) The unpaid employees are classified as creditors of S&C as they are owed money. Depending on category of debt owed to employee, it might be considered preferential per section 141 of the Companies Act. The employees can also file a winding-up petition.

(d) As S&C is registered in the Cayman Islands, the Grand Court in Cayman Islands has jurisdiction to make a winding up order.

(e) As the Grand Court has jurisdiction to wind up S&C in Cayman Islands, provisional liquidation is available to S&C. S&C can make an ex parte application under section 104(3) of the Companies Act for provisional liquidation on the grounds that (a) S&C are unable or likely to be unable to pay its debts; (b) S&C intends to present a compromise or scheme of arrangement to its creditors.

(f) The Rackham family would be allowed to continue in control of S&C in a provisional liquidation subject to the supervision of the provisional liquidator and the Grand Court. It will depend on the facts of the case as to whether the provisional liquidator's powers replace the directors.

(g) The Cayman Islands court would assess whether the proposed scheme appears to be viable or otherwise can order S&C to be wound up at the first hearing. The court will additionally assess issues of class composition, any jurisdiction issues, the adequacy of the scheme documentation and notice. The Grand Court must be satisfied that the scheme document and the supporting explanatory statement contain all the

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.

Commented [BT18]: 1/2 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]: 1.5 marks. The unpaid employees can sue S&C for the unpaid debts (provided a winding up petition has not yet been filed). Alternatively, they can apply to wind up under section 92 - 94 Companies Act or apply to apply to appoint provisional liquidators under 104 (if they are concerned about mismanagement or wish to support a court-supervised restructuring). If an order is made that S&C be liquidated, the sums due to the employees rank as preferential debts (section 141) ahead of certain other creditors.

Commented [BT20]: 1 mark.

Commented [BT21]: Section 104(3) gives a company standing to apply for the appointment of a provisional liquidator where the company is or is likely to become cash flow insolvent and it intends to present a compromise or arrangement to its creditors.

Section 97(1) provides an automatic moratorium on proceedings against S&C and enforcement of judgments etc. against S&C upon the appointment of the provisional liquidator. It is this moratorium which could give S&C the protection it needs while it seeks to restructure.

S&C could seek to restructure under a scheme of arrangement, which is a court-approved process which permits the rights of creditors or members to be varied, by forcing the relevant non-consenting creditors and/or members into the compromise or arrangement (also known as "cramping down" the dissenting creditors) (section 86(2)).

Commented [BT22]: 1 mark. It depends on the terms of the PL order. As per provisions of section 104(1)(4) of the Companies Act, once appointed by the court a provisional liquidator will carry out only such functions as the Court may confer on him/her and will exercise such powers as may be conferred by the order of appointment.

information reasonably necessary to enable to scheme creditors to make an informed decision.

*** End of Assessment ***

37.5 / 50

Commented [BT23]: 1 mark. 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.