



**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. In order to do so, the asset must be registered in a company's register of mortgages and charges.
- This applies to real estate, ships, aircraft, motor vehicles and intellectual property.
- There is no public register for mortgages and securities. This is the sole responsibility of each company to maintain this register.
- Creditors may enforce their security over the debtor company and reclaim the asset, if the debtor defaults on repayment of the associated loan. This can be done so without leave from the court.

Commented [BT12]: 1 1/2. Candidate has not demonstrated knowledge of the difference between registration procedures available (and the effects thereof) for different types of property.

#### 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 has the power to assist in bankruptcy proceedings
- The Grand Court's power to enforce orders relating to foreign bankruptcy proceedings is derived from Part XVII of the Companies Act.
- The Grand Court may exercise its powers by granting a foreign representative to act on behalf of a debtor, in any matter relating to legal proceedings that foreign representatives are a party to, have the power to stay the enforcement of any legal judgement against a debtor, and can order a debtor to hand over property to a foreign representative if required.
- The Grand Court will only exercise its powers relating to foreign bankruptcy proceedings, if they feel in doing so, it will be economic for the estate and, or, expedite the bankruptcy of the debtor estate.
- There are a number of factors to consider in this regard including the protection of claims in the Cayman Islands, the prevention of fraudulent disposition of property, comity, and the distribution of the estates assets in accordance with the statutory order of priority.

Commented [BT13]: 3 marks. The candidate has located the statutory origin of the power but has not fully understood/recited the correct test (e.g. 'best assure an economic AND expeditious ... etc')

### Question 2.3 [maximum 3 marks]

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

- The Cayman Islands does not have any international treaties with other jurisdictions relating to the recognition of foreign judgements. Instead, they will be heard on a case by case basis and adopt a co-operative approach with the creditor in question who wishes to enforce a foreign judgement on a Cayman debtor.
- There are guidelines laid out in The Foreign Judgements and Reciprocal Enforcement Act (1996) ("the 1996 Act") which provides a scheme for recognition and enforcement of foreign judgements, where the judgement has come from a jurisdiction that has assured reciprocity for Cayman Court judgements. In practice however, this has only been enacted when dealing with judgement from Australia. This is governed by Order 87 of the Grand Court Rules.
- In order for a foreign judgement to be recognised it must:
  - Be final
  - Be a money judgement; and,
  - Be made after the 1996 Act was enacted
- In general, foreign judgements are usually made by launching a new claim in the Cayman Islands, based on the common law principles.
- The mandatory requirements for enforcing a foreign judgement at common law are:
  - That the judgement is final
  - The foreign court had jurisdiction over the debtor
  - The foreign judgement was not obtained by fraud
  - Foreign judgement is not contrary to Cayman Islands policy
  - Foreign judgement not contrary to rules of natural justice
- There is also a 6 year limitation period to apply for recognition of a foreign judgement in the Cayman Islands, both under the principals of common law and the 1996 Act.

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.

- Court appointed liquidators and creditors have a number of options in attempting to seek financial damages against the former directors of the debtor company, and to seek a clawback of payments made to directors. Creditors may take certain steps prior to the company being placed into liquidation.
- In relation to court appointed liquidators:
- They have the power to compel former directors to complete a statement of affairs of the debtor company with an accompanying affidavit. This will assist in the financial analysis of the Company, possibly leading to recovery actions commenced by the liquidators against the former directors.
- With leave of the Grand Court, official liquidator's can request an oral examination of the former directors of the debtor company to discuss the financial position.
- Under Section 147 of the Companies Act, in the case where the official liquidator believes that fraudulent trading was committed prior to the debtor company being

placed into insolvent liquidation, the official liquidator can apply for an order to compel a former director to make contributions to the assets of the debtor's company to be paid out to creditors of the estate.

- The official liquidator must establish that the former directors were in breach of their fiduciary duties by not acting in the best interest of the debtor company. Under Section 147, the official liquidator can pursue claims against former directors if they were to be seen not acting in the best interest of the company, as seen in *Prospect Properties vs. McNeill*.
- Under Section 99 of the Companies Act, official liquidators can also claw-back any payments made to former directors from the commencement of the liquidation (being the date a petition has been filed to place the company into liquidation), if transactions were seen to be fraudulent, or acting against the best interest of the creditors of the company.
- In the case of creditors of a company:
- Under Section 94 of the Companies Act, a creditor can make an application to have a debtor company placed into official liquidation, and brought under the direction of the Grand Court. If granted, a liquidator is put in place, thus removing the board, putting a stop to the activities of the debtor company's activities.
- The actions brought against the former directors of an insolvent company are launched by the appointed liquidator over the estate of the debtor company. A creditor will petition to have a company wound up, and for a liquidator to be appointed, who will exercise his powers under the Companies Act, to bring claims against former directors. As mentioned above, the official liquidator, if applicable, will also attempt to claw-back any purportedly fraudulent payments made to directors, in the six months prior to the filing of the petition.
- A creditor does not have the power to bring a claim against a former director of the debtor Company for losses suffered relating to the debtor company itself. It is the fiduciary duty of the liquidator to carry out these proceedings. |

Commented [BT15]: 6 1/2. Don't forget sections 145 and 146.

### Question 3.2 [maximum 6 marks]

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

- There is a role for receivers in a Cayman Islands insolvency scenario. Although not explicitly stated in the CWR's, the Grand Court do appoint receivers in an insolvency scenario, generally when dealing with issues in dealing with the collection of money, or other smaller acts. The role, and appointment of a receiver in the Cayman Islands is governed by Order 30 of the GCR.
- Order 45 of the GCR outlines circumstances in which receivers may be appointed to deal with the enforcement of judgements relating to the payment of money to third parties.
- Although a mechanism not used on a regular basis, the appointment of a receiver is provided for by statute in the Cayman Islands when dealing with insolvent segregated portfolio companies ("SPC").
- In cases where an SPC will likely be unable to discharge its liabilities after selling all assets within its own portfolio, a receiver may be appointed by the Grand Court. If a receivership order is handed down by the Court, it will direct that the receiver will be tasked with selling the assets of the SPC, and deal with the orderly wind down of the



structure. These receivership order are only permissible if the SPC is not in the process of being wound up, or if the SPC is subsequently ordered to be wound up.

- Aside from the above examples, receivers may also play a role in an insolvency scenario if appointed by a creditor of a company to handle any fixed, or floating charges they may hold over a debtor company's assets. The receiver will be tasked with realising the charged assets on behalf of the creditor of the company. |

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) Sparrow can take action to protect its interests in recouping money owed by S&C. One of which is to file a petition with the Grand Court to place S&C into liquidation. They can do this by filing an application to place S&C into official liquidation, or into provisional liquidation. Section 94 of the Companies Act dictates that a single creditor is permitted to do so in the Cayman Islands.

Said debt must not be less than KYD100 and before doing so, Sparrow will also have to serve a demand on S&C, ordering them to pay the debt due within 21 days before filing to have the company wound up.

Sparrow has grounds for doing so as it appears there is a realistic case for making the winding up order. They must also believe a liquidator is required to preserve the assets of the Company.

It may be in the best interest of Sparrow to file a petition with the Grand Court to place S&C into provisional liquidation to allow for the possibility of a scheme of arrangement to be established, between them and the proposed liquidators.

This will also allow for a potential restructuring of the business, which may result in Sparrow being paid in full.

(b) As a creditor of S&C, Jolly Roger can also take the steps above, and avail of the referenced mechanisms as they are also a creditor of the company.

In addition to this, Jolly Roger should also seek recognition of the foreign judgement handed down by the ICC in London. Although the Cayman Court is not bound by any international treaties, they usually adopt a flexible approach in dealing with the recognition of foreign judgements.

Jolly Roger will have to commence a new action in the Cayman Islands based on the foreign judgement which is governed by common law.

The Jolly Roger judgement appears to fit the mandatory requirements for the enforcement of a foreign judgement in the Cayman Islands. This is assuming the ICC had jurisdiction over S&C. This judgement is also within the 6 year limitation period.

(c) Unlike creditors of S&C, they do not have the power under Section 94 of the Companies to file a petition to have the Company placed into liquidation.

Under Section 141 of the Companies Act, unpaid employee wages do rank as a preferential debt. In the case of S&C, employees will be paid out parri passu, alongside taxes due to the Cayman government, This is in preference to unsecured creditors of the estate, should the company be placed into insolvent liquidation.

Like third party unsecured creditors, employees must file a proof of debt, before being admitted as a creditor of the estate.

(d) The Cayman Islands Court has jurisdiction over S&C as they were incorporated in the Cayman Islands. Thus, the Cayman Court has powers to make an order in respect of this Company.

(e) S&C can file a petition with the Grand Court to place the Company into provisional liquidation. Under certain circumstances, this would allow the company to continue to trade, and allow for management to enter into negotiations with creditors of the company, with the aim of restructuring their debts. Under Section 94 of the Companies Act, this would also place a moratorium on any money judgements or ongoing court cases involving the company, and prevent the requirement to repay creditors while in provisional liquidation.

Whether it be the current management structure, or provisional liquidators appointed, they would work with creditors to formulate a plan that would allow for the restructuring of the business. There is no fixed timeline for the process, and is heavily dependent of the complexity of the restructuring.

A scheme of arrangement would have to be agreed with creditors of the Company, where a repayment schedule and proposed restructuring of the entity and its debt would have to be established.

**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]:** 1/2 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 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]:** 2 marks.

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 "crumming down" the dissenting creditors) (section 86(2)).

This process is governed by Order 102, rule 20 of the CGR. In order to do so, the party in charge must complete a three stage process being

- i) file an application with the Grand Court to convene a meeting with creditors so that the scheme can be approved
- ii) a meeting is held detailing the proposed restructuring where it is approved or denied and
- iii) if approved, an application is made to the grand court to ascertain court sanction of the scheme.

The restructuring officer's regime will provide a viable alternative for debtor companies to successfully restructure their business and is intended to supersede the provisional liquidation process although this has not yet come into force.

- (f) It is possible for the Rackham family to continue to play a part in the restructuring process of the company. If the company is placed into a "light touch provisional liquidation", they will continue their roles on the board and be one of the protagonists in formulating a plan for restructuring, alongside a provisional liquidator. The powers that remain with the directors of the company during this time are directed by the Grand Court, and vary on a case by case basis.
- (g) Before approving any proposed restructuring, the Cayman court will consider:
- Whether the proposed restructuring has the necessary creditor support (being more than 50%, representing 75% in value of each creditor class)
  - Whether the restructuring is in compliance with the convening order
  - Whether the majority is a fair representation of each class of creditor
  - Whether the Court feels an intelligent, honest member of each class of creditor would approve and is in his own interest

Commented [BT22]: 1 mark

Commented [BT23]: 3

**\* End of Assessment \***

**38.5 / 50**