



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

CAYMAN ISLANDS

This is the **summative (formal) assessment** for **Module 5C** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

The mark awarded for this assessment will determine your final mark for Module 5C. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment5C]**. An example would be something along the following lines: 202122-336.assessment5C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Select the **correct answer**.

Once a provisional liquidator is appointed:

- (a) No action may be commenced against the company without leave of the court.
- (b) No existing action may be continued against the company without permission of the provisional liquidator.
- (c) Legal proceedings may be commenced or continued against the company without leave of the court.
- (d) No action may be commenced against the company.

Commented [BT1]: Correct. 1 mark.

Question 1.2

Which of the following is **not** available in the Cayman Islands?

- (a) Appointment of a receiver.
- (b) Court-supervised liquidation.
- (c) Official liquidation.
- (d) Deed of Company Arrangement.

Commented [BT2]: Correct. 1 mark.

Question 1.3

Select the **correct answer**.

In a voluntary liquidation:

- (a) The company may cease trading where it is necessary and beneficial to the liquidation.
- (b) The company must cease trading except where it is necessary and beneficial to the liquidation.
- (c) The company must cease trading if it is necessary and beneficial to the liquidation.
- (d) The company may cease trading unless it is necessary and beneficial to the liquidation.

Commented [BT3]: Correct. 1 mark.

Question 1.4

Select the **correct answer**.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

- (a) A company incorporated in the Cayman Islands.
- (b) A company with property located in the Cayman Islands.
- (c) A company carrying on business in the Cayman Islands.
- (d) Any of the above.**

Commented [BT4]: Correct. 1 mark.

Question 1.5

Select the **correct answer**.

In a provisional liquidation, the existing management:

- (a) Continues to be in control of the company.
- (b) Continues to be in control of the company subject to supervision by the court and the provisional liquidator.
- (c) May continue to be in control of the company subject to supervision by the provisional liquidator and the court.**
- (d) Is not permitted to remain in control of the company.

Commented [BT5]: Correct. 1 mark.

Question 1.6

Select the **correct answer**.

When a winding up order has been made, a secured creditor:

- (a) May enforce their security with leave of the court.
- (b) May enforce their security with leave of the court provided the liquidator is on notice of the application.
- (c) May enforce their security without leave of the court.**
- (d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.

Commented [BT6]: Correct. 1 mark.

Question 1.7

Select the **correct answer**.

Any payment or disposal of property to a creditor constitutes a voidable preference if:

- (a) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (b) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (c) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (d) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

Commented [BT7]: Correct. 1 mark.

Question 1.8

Which of the following **is not** a preferential debt ranking equally with the other four?

- (a) Sums due to company employees.
- (b) Taxes due to the Cayman Islands government.
- (c) Amounts due to preferred shareholders.
- (d) Sums due to depositors (if the company is a bank).
- (e) Unsecured debts which are not subject to subordination agreements.

Commented [BT8]: Correct. 1 mark.

Question 1.9

Select the **incorrect statement**.

A company may be wound up by the Grand Court if:

- (a) The company passes a special resolution requiring it to be wound up.
- (b) The company does not commence business within a year of incorporation.
- (c) The company is unable to pay its debts.
- (d) The board of directors decides it is "just and equitable" for the company to be wound up.
- (e) The company is carrying on regulated business in the Cayman Islands without a license.

Commented [BT9]: Correct. 1 mark.

Question 1.10

Select the **correct answer**.

In order for a proposed scheme of arrangement to be approved:

- (a) 50% or more representing 75% or more in value of the creditors must agree.
- (b) 50% or more representing more than 75% of the creditors must agree.
- (c) More than 50% representing more than 75% of the creditors must agree.

(d) More than 50% representing 75% or more in value of the creditors must agree.

Commented [BT10]: Correct. 1 mark.

Commented [BT11]: 10/10 for this section

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

It is possible for a creditor to register its security over an asset in the Cayman Islands. A creditor can register its security over real estate, ships, aircraft, motor vehicles and intellectual property in the Cayman Islands. This can be done by filing a notice of the security with the centrally maintained registers. The effect of the registration is that a third-party purchaser will be deemed to have notice of such interest and will therefore acquire the asset subject to the secured creditors interest.

Commented [BT12]: Correct but reference needed to be made to registration in the debtor's ROM&C. 1 1/2 marks.

Question 2.2 [maximum 4 marks]

Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?

The Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings and the source of that power is provided for in Part XVII of the Companies Act which provides that the Grand Court can provide ancillary relief such as recognising the right of a foreign representative to act in the Islands on behalf of, or in the name of, a debtor; enjoining the commencement or staying the continuation of legal proceedings against a debtor; staying the enforcement of any judgment against a debtor; requiring a person in possession of information relating to the business of affairs of a debtor to be examined by and to produce documents to its foreign representative; and ordering the hand-over to a foreign representative of any property belonging to the debtor. For the Grand Court to exercise its discretion, the foreign representative must satisfy the Grand Court that it is appropriate for the Court to exercise its discretion by granting the relief sought. In determining to exercise its discretion to grant these ancillary orders, section 242 of the Companies Act provides that the Grand Court will 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, wherever they are domiciled, in accordance with the 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 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 interest created by the debtor;
- f) The non-enforcement of foreign taxes, fines and penalties;
- 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 judgements in the Cayman Islands.

In the Cayman Islands, foreign judgments can be recognised by way of statute i.e., the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (*the Act*) and under common law. However, the provisions of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provisions have only been extended to judgments from the Superior Courts of Australia. This procedure is governed by Order 71 of the Grand Court Rules. In order to be enforceable, the foreign judgment must be final; a money judgment; and made after the 1996 Act was extended to the relevant foreign country. As a result of the limitations under the Act, enforcement of foreign judgments is achieved by commencing an action based upon the foreign judgment as an unsatisfied debt or other obligation. The requirements for enforcement of a foreign judgment at common law are:

Commented [BT14]: 3 marks

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

Provided that these requirements are satisfied and the Grand Court recognises the order, the judgment debtor can pursue domestic enforcement remedies.

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.

There are no statutory prohibits on insolvent trading. However, it is 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:

1. A court appointed liquidator of an insolvent company can pursue a claim against directors who acted in breach of their fiduciary to act in the best interest of the company and they can be held liable to the company for any losses such as damages which they cause the company in breach of their fiduciary duties. In the case of *Prospect Properties v McNeil*, the Grand Court held 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 interest of its creditors.

2. Section 145 of the Companies Act also provides that a claim can be brought for voidable preference if there is disposal of property to a creditor within six months before the deemed commencement of the company's liquidation at a time when it was unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over the other creditors (putting that creditor in a better position than it otherwise would have been). Provided that these elements have been satisfied, the Court may order the creditor to return the asset and prove in the liquidation for the amount of its claim.
3. A claim can also be made under section 146 of the Companies Act for avoidance of dispositions made at an undervalue where a property is disposed of at an undervalue with the intention of wilfully defeating an obligation owed to a creditor (that is, an intent to defraud). Once the elements set out in statute has been met the Court is likely to set aside the transaction.
4. Section 147 of the Companies Act provides that where it is found that the business of a company was carried out with intent to defraud creditors, or any fraudulent purpose, a liquidator may apply for an order requiring any person who were knowingly parties to such conduct to make such contribution to the company's assets as the Court thinks proper.
5. Lastly, section 99 of the Companies Act, provides that any disposition of a company's property after the deemed commencement of the winding-up will be void in the event that a winding-up order is subsequently made unless validated by the Grand Court. Therefore, a liquidator can apply to the Grand Court for relief to require the repayment of the funds or the return of the asset.

Commented [BT15]: 8 marks.

Question 3.2 [maximum 6 marks]

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

It is well accepted in the Cayman Islands that receivers can be appointed pursuant to the Grand Court Rules and under the Companies Act.

Receivers and receiverships order are provided for by the Companies Act in respect of a Segregated Portfolio Company ("SP"). In this context, receivership orders are usually made where the Grand Court is satisfied that the SP's assets attributed to a particular portfolio of the company are likely to be insufficient to discharge the claims of creditors in respect of that portfolio. The receivership order must direct the orderly closing down of the business of, or attributable to, the segregated portfolio and the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto. Therefore, arguably receivers have a role to play where the portfolio of a company is insolvent, as where a portfolio is insolvent the Court may appoint a receiver to realize and distribute its assets. However, if a segregated portfolio company is in the process of being wound-up no order for receivership may be made and an order for receivership will cease to have effect upon the commencement of the winding-up of the segregated portfolio company. Therefore, receivers have no role to play in the insolvency of a SP.

Additionally, receiverships have a role to play as it offers an alternative course of action for creditors than insolvency proceedings of a company. They are usually appointed pursuant to rights in a security instrument and will realize the value of the charged asset and repay the creditor the amount of its unpaid debt.

In final analysis, receivers do have a role to play especially in the context of SP's.

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 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?

The law on mortgages provides that where you hold a legal title to property for security for a debt you can take possession of the property and exercise power of sale or appoint a receiver to realise the property. Therefore, if the legal title to the boats is vested in Sparrow, it can take possession and sell the boats to recover the USD 80million or it could take steps to appoint a receiver over the boats.

However, if S & C had only transferred the beneficial interest in the boat to Sparrow, and there is no power of attorney in the mortgage agreement, Sparrow will need to apply to the Court for specific performance of the equitable mortgage for which the court will convert to a legal mortgage.

As for the remaining USD120 million, Sparrow will need to commencing insolvency proceedings against S & C to recover the remaining sum.

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?

Roger Jolly can seek to enforce the arbitral award ordered by the ICC tribunal by filing an action under common law for the recognition of the award on the following grounds:

- The arbitral award is final;
- The tribunal has jurisdiction over S & C by virtue of the arbitration clause in the contract;
- The arbitral award was not obtained by fraud and is not contrary to public policy in the Cayman Islands; and
- The foreign judgment was not obtained contrary to the rules of natural justice.

Once the judgment order is obtained Roger can pursue the domestic enforcement remedies available under the Grand Court Rules.

Roger can also make an application pursuant to section 93 of the Companies Act to wind up S & C on the basis that it is unable to pay its debts.

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

The unpaid employees can file winding up petition to commence insolvency proceedings against S & C. Alternately, if winding up proceedings have been commenced they can claim in the liquidation as their salaries will be considered a preferential debt.

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

Yes, the Grand Court has jurisdiction to make (winding up) orders in respect of companies which are incorporated or registered in the Cayman Islands and S & C is registered in the Cayman Islands.

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

The legal route S & C can take to protect itself from creditor enforcement in order to negotiate a scheme of arrangement, is to obtain a moratorium against any proceedings continuing or being commenced against a company by putting the S & C into provisional liquidation pursuant to Section 104(3) of the Companies Act. S & C should file an application for the appointment of provisional liquidators and explain to the court the purpose of the application which is to allow for the negotiation and promotion of a compromise or arrangement with its creditors or members. This application must be supported by why the directors believe that the company's affairs can be turned around by the scheme. This application can be made on an *ex parte* basis on the ground that the S & C is unable to pay its debts as they fall due and that it intends to present a compromise of arrangements.

Once this has been obtained S & C can enter into a scheme of arrangement with its creditors. It will then need to file application to the Grand Court for the calling of a meeting of the creditors for the purpose of approving the scheme. At the meeting of the creditors, S & C will need to pass a majority which should be over 50% in number representing at least 75% in value of the creditors (or class of creditors) present and voting either in person or by proxy at the meeting who must agree to the arrangement.

Once S & C secures a majority, it will need to apply to the court for sanction of the scheme.

Commented [BT18]: 1.5 marks. 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\$0m 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]: 2.5 marks.

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.

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

Upon the appointment of provisional liquidators, the Court will determine which powers will remain with the directors, if any and which powers will be vested in the provisional liquidators. Therefore, the Rackham family role in the restructuring process in the management of S & C in the restructuring process will be determined by the Court.

Commented [BT22]: 1 mark

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

Before the Court sanctions a scheme of arrangement, the Court will consider whether there has been compliance with its orders such as the orders in relation to the convening of meetings etc. The Court will also consider whether the majority fairly represent the class of creditors approving the scheme and whether the arrangement is such that an intelligent, honest member of the class convened, acting in his own interest might reasonably approve it.

Commented [BT23]: 2.5

*** End of Assessment ***

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