



**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]:** Incorrect. Correct answer is A.

#### **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]:** Incorrect. Correct answer is D.

#### **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]: Incorrect. Correct answer is C.

#### 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]: 7/10 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, it is possible for a creditor to register its security over certain types of assets in Cayman Island. These assets are real estate, ship, aircrafts, motor vehicles and intellectual property. Registers are centrally maintained for these assets and, mortgages and charges can be registered against them. Therefore, a third-party purchaser would be deemed to have notice of the creditors' interests and acquire the assets subject to the prior interest.

For other assets without a centrally maintained register, creditors, have the responsibility of ensuring that their interests are protected from a third-party purchaser for value.

Commented [BT12]: 2 marks. Reference to ROM&C needed for full 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?

[Given the tax-friendly jurisdiction, the Grand Court is frequently called on to recognise the foreign bankruptcy proceedings for reorganising or rehabilitating companies that are either domiciled or hold assets in the Cayman Islands. To this end, Part XVII of the Companies Law provides for international co-operation in insolvency proceedings. Furthermore, Section 241 of the Companies Law permits the Grand Court to provide recognition and ancillary relief to a foreign representative who has been appointed to a debtor in the course of a foreign bankruptcy.

The Grand Court's decision to use its powers is determined on the basis that the matter will assure economic and expeditious administration of the debtor's estate consistent with various factors including

- comity,
- just treatment of all holders of the claim,
- non-enforcement of foreign taxes, fines and penalties
- prevention of preferential or fraudulent disposition of property

Commented [BT13]: 4 marks

- the protection of claim holders in Cayman Island against prejudice and inconvenience in processing of claims in foreign proceedings

]

### Question 2.3 [maximum 3 marks]

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

[The Grand Court recognises foreign judgments in Cayman Islands on the basis of co-operative approach for the protection of creditors' interest. One of the laws for the recognition of these judgments is Foreign Judgments Reciprocal Enforcement Law, 1966 Revision (The Law) which provides that judgment would be recognised and enforced where the country from which the judgment originates assures substantial reciprocity of treatment in regards to enforcing Cayman Islands judgement. This Law has been extended to the Superior Courts of Australia, and for such judgment to be recognised it must be final, a money judgment and made after the 1966 Law.]

Commented [BT14]: 3 marks

In view of the limited application of the Law, foreign judgments are usually enforced at common law by the commencement of a new action, on the ground of unsatisfied debt or other obligation. Money and non-money judgments (including declaratory judgments) are enforceable at common law. For foreign judgments to be enforced at common law, it must be final, not be obtained by fraud, not be contrary to public policy of Cayman Island, and not be obtained in contravention of 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.

[Cayman Islands does not have a statutory prohibition for companies to stop trading when insolvent. This, however, does not mean that Cayman Islands is ill-equipped to deal with directors who wilfully disregard the interest of creditors. Directors have the fiduciary duty to act in the best interest of the company, therefore where directors who fail to take into consideration the interest of the creditors and ultimately the company, such director may be held liable. Thus, in the case of *Prospect Properties v. McNeil*, the Grand Court held that where a company is insolvent, the director's duty to act in the best interest of the company, requires them to consider the interest of the creditors.

Furthermore, in an official liquidation, the liquidator can also file an action against a director that acts without regards to its fiduciary duty. Since it is the interest of the creditors to be paid, it is in the interest of the company to be safeguarded against being put in a position where it is unable to pay.]

Commented [BT15]: 3 marks. Question calls for discussion of sections 99,135,145-147 Companies Act.

#### Question 3.2 [maximum 6 marks]

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

[Insolvency involves the management of the company and distribution of assets to various stakeholders in accordance with statutory priority payment positions. Receivers are not

explicitly recognised in the statutory provisions dealing with insolvency. However, the Grand Court Rules do recognise that receivers may be appointed for the purpose of performing certain acts, such as collecting money, execution of contracts or title documents.

Receivers are appointees of creditor seeking to exercise their rights under a security agreement. Such right of appointment may be exercised without recourse to courts. Therefore, where a debtor company is insolvent and there have been payments default a creditor may exercise the right to appoint a receiver, who has the responsibility of protecting the interest and realising the security of such creditor.

From the above points, it is clear that the receiver does have a role to play in an insolvency scenario where the creditors having a charge over assets of the company enforce its rights under security agreements.]

Commented [BT16]: 3.5 marks. OK but what about SPCs?

**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. With a mortgage over four of the S & C boats, Sparrow is a secured creditor, and can take steps to enforce its security. Depending on whether he has a legal mortgage or an equitable mortgage he can explore various options. Since S & C has defaulted, in the case where Sparrow has a legal mortgage over the boats, without any recourse to courts he can take possession of the boat and sell them to realise the loan amount, or appoint a receiver to do this on his behalf.]

Where Sparrow has an equitable charge over the boats, he does not have a right to take possession of the boats. However, where the mortgage agreement contains a power of attorney in Sparrow's favour permitting it to execute a transfer of document of the property to its name upon default, he can exercise this right. In the event that the power of attorney provision is absent, Sparrow would need to apply to court for specific performance. In which case the court may convert the equitable mortgage into a legal mortgage and confer the related rights and powers. ]

B. Firstly, Roger Jolly should take steps to ensure that the ICC arbitration award is enforced as a judgment of court. Since Cayman Island adopts a cooperative approach to protect the interest of creditors, the courts are likely to recognise and enforce a judgment from the courts where Roger Jolly is incorporated. Secondly Roger Jolly should pursue an action in Cayman Island under common law by commencing a new action for the purpose of recognising and enforcing its monetary claims against S & C. ]

C. Payments to employees are made in priority to other debts in an insolvency situation. Section 141 of the Companies Act provides that in the case of an insolvency sums due to the employees is one of priority payments. Therefore, when the insolvency proceedings are commenced against S & C, the employees can bring submit a claim to the liquidator to recover the unpaid wages. Alternatively, the employees may bring an action recover to the unpaid wages in court, pending the commencement of the insolvency process. ]

D. Cayman Island Courts have jurisdiction over S & C since it is a company registered in the country. ]

E. S & C requires a breathing space to able to restructure. It should therefore make an *ex parte* application to the Grand Cayman Island Court seeking an order for provisional liquidation pursuant to Section 104(3) of the Companies Act. An application under Section 104 (3) can be made on the grounds that the "*company is or is likely to become unable to pay its debt as they fall due and the company intends to present a compromise or arrangement*". Obtaining this order would put a moratorium against the commencement of any action against S & C, and it would have the time to restructure. ]

F. With the appointment of the provisional liquidator, the Grand Court determines the extent of the powers (if any) that would remain with the directors and the powers that would now be vested in the provisional liquidator. Rackham family may or may not be able to continue to run S & C during the restructuring process, it depends on the order by the Grand Court. ]

**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]:** 2.5 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)).

**Commented [BT22]:** 1 mark.

G. Cayman Island Courts would consider if the convening orders were complied with. Also, it would consider if the restructuring plan was approved by more than 50% representing 75% or more in value of the creditors must agree. The court would also consider the intelligibility and reasonableness of the restructuring plan.

Commented [BT23]: 2.5

**\* End of Assessment \***

**33 / 50**