



**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?

A creditor may take security over immovable and movable assets in the Cayman Islands (section 54 of the Companies Act). It is therefore possible for a creditor to register its security over real estate, ships, aircraft, motor vehicles and intellectual property in the Cayman Islands.

Commented [BT12]: 3 marks

The security interests are required to be entered in the register of mortgages and charges of the debtor company (section 54). Registration of a security in the company's register would not create priority. However, the register may be inspected by any member or creditor of the company and puts third parties on notice of the security.

The creditor may also register the charge on the real estate, ships, aircraft, motor vehicles and intellectual property centrally maintained registers in the Cayman Islands. This is important as a third-party purchaser would be deemed to have notice of the security interest and will acquire the asset subject to the secured creditors' registered interest.

#### 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 Court has the power to assist foreign bankruptcy proceedings in accordance with Part XVII of the Companies Act. The court can provide ancillary relief such as:

- a. Recognising the right of a foreign representative to act in the Cayman Islands on behalf of, or in the name of, a debtor;
- b. Enjoining the commencement or staying the continuation of legal proceedings against the 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 court will consider whether it is appropriate for the Court to exercise its discretion in granting the relief sought upon considering matters which will best assure an economic and expeditious administration of the debtor's estate (section 242). This includes:

- 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 points

### Question 2.3 [maximum 3 marks]

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

A foreign judgment may be recognised either by the requirements of Foreign Judgments Reciprocal Enforcement Act (1996 Revision) or at common law.

In order for a judgment to be recognised under the Act, the foreign judgment must be final, a money judgment and made after the Act was extended to a relevant foreign country. To date, the Act has only been extended to judgments from the Superior Courts of Australia. Additionally, the judgment will only be enforceable within six years from the date of the judgment or, when there have been appeals, the date of the last judgment.

As a result of the limited application of the Act, most foreign judgments are usually enforced at common law by commencing a new action in the Cayman Islands. The basis of the claim would be that the foreign judgment is an unsatisfied debt or other obligation. The common law requirements for recognition are

- 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.

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.

There is no statutory prohibition on insolvent trading in the Cayman Islands, but under common law principles, the former directors of a company can be held personally liable to the company for any losses which they cause to the company. The former directors will be so liable where they fail to discharge their fiduciary duty to act in the best interests of the company.

A court appointed liquidator can pursue a claim against the former directors and the court may hold that the former directors are liable to the company for any losses such as damages which they cause the company in breach of their fiduciary duties. As made clear in the case of *Prospect Properties v McNeil*, 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. A breach of this duty can bring about liability on their part.

A court appointed may bring claims against the former directors in relation to: (i) avoidance of property dispositions, (ii) voidable preferences; (iii) dispositions at an undervalue and/or (iv) fraudulent trading.

The claim for voidable preferences is grounded under section 145, and can be brought for voidable preference if there is disposal of property to a creditor within six months before the deemed commencement of liquidation at a time when the insolvent company was unable to pay its debts and the dominant intention of the company's directors was to put that creditor in a better position than it otherwise would have been.

Section 146 also provides for the avoidance of dispositions made at an undervalue where a property / asset was disposed of by the company at an undervalue with the intention of wilfully defeating an obligation owed to a creditor.

Also section 147 provides gives a liquidator the option to 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.

Additionally, under section 99 of the Companies Act, any disposition of a company's property after the commencement of the winding-up will be void in the event that a winding-up order is subsequently made unless validated by the Court. A liquidator may therefore seek 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.

Receivers can be appointed in respect of Cayman company, albeit they are not explicitly mentioned in statutory provisions dealing with insolvency. Additionally, the court rules contemplate that receivers may be appointed for collecting money or carrying out some other act deemed necessary.

Receivers are useful both to secured and unsecured creditors. For example, a secured creditor may appoint a receiver for the purposes of collecting money or to carry out some other act such as the execution of a contract or a document of title. The secured creditor may therefore use this as an alternative to going before the court, and the receiver will owe a duty to the creditor rather than the company.

The receiver appointed by the secured creditor will have powers under the security instrument and these powers will usually include a power of sale, whereby the receiver will be able to realise the value of the security and repay the creditor the amount of its unpaid debt. The receiver will therefore provide a route for the secured creditor to recover the debt.

Receivers and receiverships order are also provided for by statute in relation to a SP company and are generally made by the court if it 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. When the court is so satisfied, it will appoint a receiver to manage the company's portfolio for the purposes of (i) the orderly closing down of the business of, or attributable to, the segregated portfolio and (ii) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse to them. When the court grants a receivership order, no claims may be commenced against the SP in relation to the segregated portfolio in respect of which the receivership order was made without leave of the court.

Receivers therefore play an important role in the Cayman Islands.

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?

#### **What action can Sparrow take to protect its interests?**

Sparrow, as a secured creditor for \$80 million of the \$200 million debt, may appoint a receiver over the secured assets which are 4 of S & C's party boats, up to the value of the security. This is provided that the mortgage / security agreement is in standard terms whereby it provided Sparrow with the right to appoint a receiver upon default. Through the receiver, Sparrow would be able to deal with the 4 boats which are subject to the mortgage, outside of any insolvency proceedings. Sparrow could also sell the 4 party boats through the receiver who would pay over the proceeds to Sparrow.

Sparrow may also consider bringing a winding up petition to seek to recover the excess outstanding loan amount, as an unsecured creditor. This is because the mortgage only applied to \$80 million of the \$200 million loan.

#### **What action can Roger Jolly take to protect its interests?**

Roger Jolly may apply to recognise the ICC award in the Cayman Islands by bringing a common law claim for recovery of the USD 50 million dollar debt. The ICC award would be capable of being recognised provided it final, the arbitral panel had jurisdiction over the debtor, the award was not obtained by fraud, was not contrary to public policy of the Cayman Islands, and was not obtained contrary to the rules of natural justice.

Once the award is recognised in the Cayman Islands, Roger Jolly may utilise the full range of domestic enforcement remedies available for enforcing any ordinary judgment issued by the Grand Court Rules.

**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]:** 1.5 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.

However, it must be remembered that S&C is insolvent and so that may affect any recovery Roger Jolly may realise.

Joger Jolly should therefore also consider bringing an application to wind up S & C on the basis that the company is unable to pay its debts within the meaning of section 93 of the Companies Act. In order to prove that the company is unable to pay its debt (and thus insolvent) Jolly may serve on the company a demand requiring payment of the 50m within 3 weeks.

#### **What action can the unpaid employees take against S & C?**

They may apply to wind up the company the basis that they are creditors and the company is unable to their salaries – which is a debt pursuant to section 93 of the Companies Act.

Payments due to employees are treated as a preferential debts (section 141 ) and are paid in priority to all other debts save for liquidation expenses. The employees could therefore stand to benefit even if they do not themselves bring the application for winding up, as the liquidator will pay all debts based on priority (even if the winding up was brought by an application by Jolly or Sparrow). Where the company is wound up, the employees may submit their claims to the liquidator.

Commented [BT19]: 2 marks

#### **Does the Cayman Islands Court have jurisdiction over S & C?**

Yes. The Grand Court has jurisdiction to make winding up orders in respect of S&C as it is a company that is registered in the Cayman Islands.

Commented [BT20]: 1 mark.

#### **Is there a legal route via which S & C can protect itself and seek to restructure?**

S & C may then enter into a scheme of arrangement with its creditors while seeking to appoint “light touch” provisional liquidators and obtaining the benefit of a moratorium against any proceedings continuing or being commenced against a company.

In considering the application for light touch liquidators, the court will need to be satisfied that the affairs of the insolvent company can be turned around by a scheme of arrangement.

Commented [BT21]: 2 marks.

In order for implementing the scheme, S&C will need to convene a meeting of the creditors, and secure a majority in number (over 50%) 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 this is done, it is binding on all creditors or class or creditors which approved the scheme.

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 “cramming down” the dissenting creditors) (section 86(2)).

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

Where light touch provisional liquidators are appointed the court will determine which powers will remain with the directors and which will be vested in the provisional liquidators. Generally when a company enters into provisional liquidation for the purpose of restructuring or entering into a scheme of arrangement, the directors/management will remain in place and continue to manage the company, subject to whatever the court decides. On this basis, it is possible for the court to allow the Rackham family to continue to play some role in the restructuring process.

Commented [BT22]: 1 mark

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

The court consider:

1. whether the scheme received the necessary creditor support / approval;
2. whether the majority of the creditors fairly represent the class,
3. whether the arrangement (having regard to the alternatives) is such that an intelligent, honest member of the class convened, acting in his own interest, might reasonably approve it.
4. Whether the scheme is fair. |

Commented [BT23]: 2.5

**\* End of Assessment \***

**44.5 / 50**