



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]: Incorrect. Correct answer is D.

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]: 9/10 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, for certain types of assets. The creditor must file notice of its security with the relevant centrally maintained register if the asset is real estate, a ship, aircraft, a motor vehicle or intellectual property. For other types of property, the creditor should ensure that the register of mortgages and charges for the debtor is clear before making the loan, and subsequently updated with details of the security after granting the loan. The register for mortgages and charges is maintained at the debtor company's registered office in the Cayman Islands and can be examined by any member of the company or creditor.

Commented [BT12]: 2 1/2 marks. Registration of security in respect of certain types of asset (eg real estate, vessels) DOES create priority.

The effect of registration is to put third parties on notice of the existence of the security. Registration does not create priority.

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?

Yes, the Cayman Islands Grand Court (**Grand Court**) does have such power. The Cayman Islands Companies Law (2018 Revision) (**Companies Act or Companies Law**) contains provisions dealing with cooperation in international bankruptcy and insolvency proceedings. Foreign bankruptcy proceedings is defined to include proceedings for the purpose of reorganising or rehabilitating an insolvent debtor.

The foreign representative, defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding, can apply to the Grand Court for assistance and the Grand Court has discretionary power to assist foreign bankruptcy proceedings. Assistance can include granting an order staying or preventing the commencement of legal proceedings and examining relevant persons mentioned in s. 103 of the Companies Law.

In exercising its discretion, the Grand Court will be guided by what will best assure an economic and expeditious administration of the debtor's estate, including:

Commented [BT13]: 4 marks

- a. the just treatment of all holders of claims against or interests in a debtor's estate, wherever they may be domiciled;
- b. the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
- c. the prevention of preferential treatment or fraudulent dispositions of property comprised in the debtor's estate;
- d. the distribution of the debtor's estate amongst creditors in accordance with the order prescribed by Part V of the Companies Act;
- e. the recognition and enforcement of security interests created by the debtor;
- f. the non-enforcement of foreign taxes, fines and penalties; and
- g. principle of comity.

The Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 contains the procedures by which a foreign representative can be recognised in the Cayman Islands and seek assistance of the Grand Court.

Question 2.3 [maximum 3 marks]

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

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for the recognition and enforcement of foreign judgments, as long as the country from which the judgment originates has in place reciprocity of treatment regarding the enforcement of Cayman Islands judgments (see s. 3(1)). However, to date, only judgments from superior courts of Australia have been so recognised. The procedure is governed by Order 71 of the Grand Court Rules. In order to be enforceable, the judgment must be final, a money judgment (and not declaratory relief), and made after the 1996 Revision of the Foreign Judgments Reciprocal Enforcement Act was extended to the relevant foreign country.

Given the limited scope of judgments presently enforced by statute, foreign judgments from other jurisdictions can be achieved by commencing a new action in the Cayman Islands based on the foreign judgment as an unsatisfied debt or other obligation (monetary and non-monetary judgments are enforceable at common law). Such actions are conducted under the Grand Court Rules. To be enforceable at common law,:

- a. the foreign judgment must be final;
- b. the foreign court had jurisdiction over the debtor;
- c. the foreign judgment was not obtained by fraud;
- d. the foreign judgment is not contrary to public policy in the Cayman Islands; and
- e. 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.

Official liquidators can bring claims against directors on behalf of the company to make them personally liable for any losses caused to the company, if it can be shown that the directors acted in breach of their fiduciary duty to act in the best interests of the company.

Under s. 145 of the Companies Act, any payment or disposal of property to a creditor constitutes a voidable preference if (a) it occurs within 6 months prior to the deemed commencement of the company's liquidation and at a time when it was unable to pay its debts; and (b) the dominant intention of the directors was to give the relevant creditor a preference over other creditors. The Cayman Islands Court of Appeal and Judicial Committee of the Privy Council in *Re Weaving Macro Fixed Income Fund Ltd (in Liquidation)* [2016] (2) CILR 514 and [2019] (2) CILR 245 considered each limb of the test above to be applied in identifying voidable preferences.

Under s. 146 of the Companies Act, a transaction whereby property is disposed of at an undervalue (i.e. no consideration or substantially below the value of the property) and with the intention of willfully defeating an obligation owed to a creditor (i.e., an intent to defraud), is voidable on application by the liquidator to the court. The application must be brought within 6 years of the disposal.

Under s. 147 of the Companies Act, if the directors carried on the business of the company with the intent to defraud creditors or for any fraudulent purpose, a liquidator may apply to the Court for an order requiring any persons who were knowingly parties to such conduct to make contributions to the company's assets as the Court thinks proper.

Commented [BT15]: Good. 7 marks. Answer could have been enhanced by referring to Prospect Properties and other sections of the Act such as 99.

Question 3.2 [maximum 6 marks]

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

Receivers can play a role in a Cayman Islands insolvency. A receiver appointed by way of order from the Grand Court or via appointment under a contractual security arrangement can be an effective enforcement tool for a secured creditor or a judgment creditor.

There is an inherent flexibility in receivership appointments arising under contract, as there are no specific statutory provisions governing such appointments and there is no statutory requirement to register the appointment of a receiver in the Cayman Islands.

A receiver appointed to a segregated portfolio of a segregated portfolio company (SPC) by the Grand Court triggers an automatic stay on proceedings so that the SPC can enjoy protection and relief from enforcement or any other action being taken against it. In addition to realisation of the SPC's assets a receiver can investigate into the conduct of the SPC's segregated portfolio assets and if applicable the general assets, without the need for a liquidator to be appointed over the SPC. A receiver could also apply to the Grand Court for further powers not expressly found in s. 224 of Companies Law (2018 Revision), if required.

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) As a precaution, Sparrow should check that its security over the party boats is registered in the centrally maintained register for vessels in the Cayman Islands, to ensure that any third-party purchaser of the party boats will be deemed to have notice of Sparrow's interest.

Under s. 142 of the Companies Act, Sparrow can immediately enforce its security over the 4 party boats and sell these boats to satisfy as much of the outstanding loan as possible. Sparrow can do this at any time without the permission of the court or reference to any liquidator (Order 17 of Companies Winding Up Rules 2018 (CWR)).

As the debt owed by S&C to Sparrow is greater than the value of Sparrow's security, Sparrow can prove in the ensuing liquidation for the unsecured balance.

- (b) Roger Jolly is a judgment creditor for the value of the arbitral award. As such, it can apply to the Grand Court for appointment of a receiver pursuant to Order 30 GCR against S&C. A receiver appointed by the Court will be given the right to identify, investigate and sale of specified property which Roger Jolly proves to have an

Commented [BT17]: 2 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.

equitable interest to the satisfaction of the Court. This specified property could be any unencumbered ships or the large dry dock facility, if they are owned by S&C, up to the value of USD 50 million.

- (c) Sums owed to employees comprise preferential debts under s. 141 of the Companies Act. As such, should S&C enter into an official liquidation and adequate sums are realised to repay preferential debts *pari passu*, after paying the liquidation expenses, employees can be paid sums owed to them in equal proportion to other preferential debts, if any, and ahead of any other creditors except secured creditors.
- (d) The Cayman Islands Court does have jurisdiction over S&C because it is registered in the Cayman Islands.
- (e) Although not obliged to do so under the Companies Law, S&C can propose a scheme of arrangement to try and enter into an agreement with its creditors and shareholders (noting management and shareholders are all members of the same family) to either:
- restructure its affairs while solvent so that it can continue to trade and avoid liquidation (this seems unlikely as the facts presented do not appear to show that S&C is solvent); or
 - reach a compromise or arrangement with creditors or shareholders after liquidation has commenced.
- (f) If S&C stays out of liquidation, the Rackham family can stay in control of the company. If the scheme of arrangement is placed into provisional liquidation so as to protect S&C from creditors and allow it time to restructure its business), the Rackham family may be allowed to continue managing and controlling S&C subject to the supervision of the provisional liquidator and the Grand Court. Whether this is permitted by the Grand Court depends on the circumstances – sometimes directors are relieved of control of the company. If the directors are permitted to remain in control, this is called a “light touch” provisional liquidation.
- (g) A scheme of arrangement requires the sanction of the Grand Court in order for it to be binding on creditors and shareholders. The Court will consider whether it is appropriate to convene class meetings of creditors and if so, what the composition of those classes should be. It looks like there will be different classes of creditors here, with preferential debt holders, unsecured trade creditors and the unsecured balance of the mortgage held by Sparrow.

The applicant (either S&C or creditors (or any class of them) or shareholders) must satisfy the Court that the scheme documentation will provide creditors with all information reasonably necessary to make an informed decision about the merits of the proposed scheme of arrangement and that they will have the right to attend and be heard at the hearing of the petition.

In this regard, within 7 days of the creditors' meeting, the application must file a supplementary affidavit sworn by the Chairman of the meeting verifying that notice was duly sent in accordance with the Court's order for directions, that the meeting was duly held and giving particulars of the results. If a majority in number representing 75% in value of the creditors present and voting either in person or by proxy, agree to the scheme of arrangement, the scheme shall, if sanctioned by the Court, bind all creditors and S&C.

*** End of Assessment ***
39 / 50

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

Commented [BT22]: 1 mark

Commented [BT23]: 2 marks. Factors include:

- The meeting was properly convened (in accordance with the court's initial order)
- Proposal approved by over 50% in number representing 75% or more in value of the creditors (or class of creditors) present and voting
- whether the majority of Stakeholders voting acted in good faith, were a fair representation of the relevant Class
- that the Scheme is better than the result would be if the company were wound up, and
- that an intelligent and honest member of the Class would agree that the Scheme should be approved.