



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]: Incorrect. Correct answer is B.

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]: 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?

- A creditor can register its security over an asset in the Cayman Island if the asset in question is real estate, ships, aircraft, motor vehicles and intellectual property. Security over these type of assets are registered via filling of notice of security with the centrally maintained registers.
- For other types of assets, there is no public security registration available. However, Section 54 of the Companies Act requires that all security interest to be entered in the register of mortgages and charges which the debtor company is required to be maintained at its registered office in the Cayman Island.
- By registering the security with the centrally maintained registers, third party purchaser of the assets will be deemed to have notice of the creditor's interest. The acquisition of the asset will then be subject to the creditor's interest.
- Registration of the security interest of the creditors in the register of mortgages and charges maintained by the debtor company also put third parties on notice of the existence of the creditor's security.

Commented [BT12]: 3 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.
- The Grand Court's power is derived from the Companies Act which is provided for in Part XVII of the act.
- The Grand Court may exercise its power to assist foreign bankruptcy proceedings if the foreign representatives is able to satisfy the Cayman court that it is appropriate for the court to exercise its discretion by granting the relief sought by the foreign representatives.
- The Grand Court may also exercise its powers to grant assistance to foreign bankruptcy proceedings if the reliefs granted will best assures an economic and expeditious administration of the debtor's estate.

Commented [BT13]: 2 marks. The statutory circumstances are set out at s.242.

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), where the procedures for recognition of the foreign judgments under the provisions of the act is governed by Order 71 of the Grand Court Rules.
- Enforcement of foreign judgment at common law by obtaining a local judgment based upon the foreign judgment.
- Recognition of foreign judgment via common law and the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) is subject to a six year limitation which runs from the date of the judgment or the date of the last judgment where there have been appeals.

Commented [BT14]: Correct but more detail required for full marks. 2.5 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.

Under normal circumstances, directors owe their fiduciary duties to the shareholders of the company. However, when the company enters into an insolvent position or where the going concern status of the company is in doubt, the directors fiduciary duties shift to protecting the interest of the creditors. The Grand Court in deciding the case of Prospect Properties v McNeill held that where the company is insolvent, the directors of the company is required to act in the best interest of the company and to have regard to the interest of the creditors of the company, where it is in the interest of the creditors to be paid and it is in the interest of the company to be safeguarded against being put in a position of not able to pay the creditors. Notwithstanding the absence of a statutory prohibition on insolvent trading, the official liquidators can bring an action against the directors for breach of fiduciary duty and make the directors to be liable to compensate the company losses incurred by the company due to the directors action. The directors may be able to raise a defence against claims of insolvent trading by showing that they have exercised reasonable judgment when deciding to continue trading with a view to provide a higher return to the creditors than to cease trading. The official may also apply to court pursuant to Section 145 of the Companies Act to void any preference payment to creditors over other creditors although the transaction in question might not be classed as a voidable transaction if the directors is able to proof that the payment is made in a normal course of business (i.e payment to essential suppliers in order to obtain continued supply when deciding to continue trading with the view to provide higher return to the creditors than to cease trading.

Commented [BT15]: 5 marks. Don't forget other relevant sections such as s.99, 146 and 147.

Question 3.2 [maximum 6 marks]

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

In a Cayman Island Insolvency scenario, the receiver plays a role in offering an alternative course of action for certain type of creditors to recover the amount owing from debtor company. Creditors who have security over the assets of its borrower may opt to appoint a Receiver to enforce its security where the option of appointing a receiver is provided for in the secured creditors security document. Although not specifically dealt with in the Cayman Island statutory provisions dealing with insolvency, appointment of receiver allows secured creditor with another means to the standard method of recovery provided under the Cayman Island statutory provisions to recover the amount owing from its borrower. Upon appointment by the secured creditor, the receiver may exercise the powers provided to him under the security document to deal with the secured assets. This may include the powers to take possession, manage, and sell the secured assets for the purpose of repaying the amount owing to the secured creditors.

Receiver appointed by Court under the Grand Court Rules against judgment creditor have a role in recovering a specified asset for the secured creditors who have obtained the judgment debt, to the satisfaction of the Court. The Grand Court Rules provide the appointment of receiver for the purposes of collecting money (for example rent) or carrying out other acts such as executing a contract or document of title to meet the recovery objective of the secured creditors.

Appointment of receiver over Segregated Portfolio Companies (SPC) pursuant to Section 224 of Companies Act allows for safeguarding, investigation and realisation of assets of one or more portfolios of SPC instead of a liquidation of the assets of the SPC as a whole as provided in the statutory provisions dealing with insolvencies. Under this appointment, the role of the receiver is somewhat similar to that of a liquidator. The receivership order granted by the Grand Court will be for the purpose of orderly closing down of a business attributable to the segregated portfolio and distribution of the segregated portfolio assets attributable to the segregated portfolio to parties who are entitled to the recourse.

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) In view that Sparrow has been granted security over four of S&C largest party boat, Sparrow will be able to enforce its security to take possession of the secured assets and exercise its power to sell the secured assets without leave of court or reference to the liquidator should S&C is placed under liquidation. Sparrow would also have the option to appoint a receiver should the security document provides for a appointment of receiver. The appointed receiver would then exercise his power provided under the security document to take possession, manage, retain payment in relation to the secured assets and realise the secured asset for the purpose of repayment of the amount due to Sparrow.
- b) Roger Jolly would be able to apply to court to obtain judgment against S&C for the non payment of the awarded damages. Should the judgment is obtained from jurisdiction outside of Cayman Island, enforcement of the foreign judgment in Cayman Island is possible by way of Common Law. To enforce the judgment, a local judgment from the Cayman Island court can be obtained based on the foreign judgment. Upon obtaining the local judgment, Roger Jolly is able to file for petition to wind-up S&C on the basis that S&C is unable to pay its debt. Roger Jolly's debt will however be unsecured and distribution from realisation of S&C's asset will be subject to the order of priorities pursuant to the Companies Act.
- c) In the event that S&C is placed under official liquidation, the unpaid employees of S&C will need to file their proof of debts to the Official Liquidator for the amounts due. Should the proof of debt is accepted by the Official Liquidator, the amount due to the employees will be preferential pursuant to the order of priorities and would ranked for distribution ahead of unsecured creditors after cost of liquidation.
- d) Yes, as S&C is a company registered in the Cayman Island.
- e) Notwithstanding the absence of a legislative framework in Cayman Island for a formal rescue, S&C may consider to enter into a Scheme of Arrangement with its creditors to protect itself and seek to restructure. In order to obtain a court ordered stayed against execution of its asset, S&C will need to apply for an order to appoint a provisional liquidator prior to file the scheme petition. S&C will then make application to the Grand

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 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\$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.

Court to obtain the order to conduct creditors meeting to consider the proposed restructuring scheme, obtained creditors approval to the scheme and obtained court sanction of the creditors approved scheme.

- f) The Rackham family may continue to be involved in running S&C during the restructuring period subject to the supervision of the provisional liquidator and the Grand Court.
- g) Before approving any proposed restructuring scheme, the court will consider whether the scheme has obtained the necessary creditors support during the creditors meeting, whether the majority fairly represents the class of creditors and whether the arrangement approved by the creditors is such that an intelligent honest member of the class convened acting in his own interest might reasonably approve such scheme.

*** End of Assessment ***

36.5 / 50

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. It depends on the terms of the PL order. As per provisions of section 104(1)(4) of the Companies Act, once appointed by the court a provisional liquidator will carry out only such functions as the Court may confer on him/her and will exercise such powers as may be conferred by the order of appointment.

Commented [BT23]: 2 marks. Factors include:

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