



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?

In the Cayman Islands there is no public security registration regime. Instead, Section 54 of the Companies Act requires that the security interest is instead registered in the register of mortgages and charges of the Company. This register must be maintained by the Company at its registered office and be available for any member to review at any time.

Failure of a Company to maintain the register does not invalidate the security, and registration of the security on the Company's register does not create a priority. Instead, under Cayman law, the relevant law determining priority of security interests is determined by the location of the asset.

Commented [BT12]: 2 marks. Don't forget the central registers for real estate etc. and the effect of registration therein.

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 Grand Court's powers to make orders in support of foreign proceedings stems from Part XVII of the Companies Act. Cayman Islands has not adopted the UNCITRAL Model Laws on cross border insolvency, though most of the principles are followed in the interested of comity.

The Cayman Islands does not have a threshold test in order for it to grant assistance to a foreign proceeding. The Caymans Islands also does not have an automatic right based on COMI of the debtor. Rather, a foreign representative must satisfy the Caymans Courts that it the granting of the recognition or relief sought by the foreign representative in its discretion is appropriate on the facts of the application.

The Grand Court's discretion must be exercised and guided by the facts pertaining to the matter regarding whether making such an order will a better economic outcome and expedite the proceedings, the discretion must also be consistent with the following principles: creditors

are treated justly regardless of location, claimants from Cayman Islands are protected from prejudice or inconvenience, the prevention of fraudulent or preferential asset disposal, the estate is distributed in accordance with the statutory order of priority where possible, the recognition and enforcement of secured interests, non-enforcement of foreign taxes and penalties, and comity.

Commented [BT13]: 3 1/2. The examiner felt unable to give full marks in the absence of the candidate citing the precise criteria or referencing exactly where the criteria are to be found (in s.242).

Question 2.3 [maximum 3 marks]

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

Commented [BT14]: 3 marks

The Cayman Islands Grand Court has adopted a collaborative approach to ensure that companies being wound up provide protection to the interests of the creditors wherever they are situated.

The Cayman Islands does not have any treaties in place with any other country or territory. However, in respect of statutes, the Cayman Islands does have the Foreign Judgements Reciprocal Act in place which provides a statutory mechanism for recognition and enforcement of foreign judgements. However, this is only available where the judgement originates from a jurisdiction which assures substantial reciprocity with Cayman Islands judgements being enforced in that jurisdiction. This is not a commonly used piece of legislation and only applies to foreign judgements that are final, money judgements and made after the Foreign Judgements act was extended to the foreign jurisdiction.

The more commonly used method to achieve recognition is by way of the Grand Court Rules based on a new action before the court. A foreign judgement can be enforced through this method if the judgement is final, the foreign court had jurisdiction over the debtor, the foreign judgement was not obtained fraudulently, it does not contravene the Cayman Islands public policy and it has not been obtained contrary to natural justice rules.

Additionally the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 have been introduced to further provide clarity on procedures that a foreign representative can use to recognised in Cayman Islands and seek assistance from the Grand Court.

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 obligation in Cayman to file for insolvency when a business is insolvent. Additionally, the Companies Act does not provide for wrongful trading to be bought against a director who continues to trade whilst a company is insolvent.

A Liquidator can, however, bring claims against directors on behalf of the company who can be held personally liable to the company for any losses they cause the company to incur as a result of their actions that may have breached their fiduciary duties to act in the best interests of the company. Prospect Properties v McNeil held that where a company is insolvent the director has a duty to act in the best interests of the company and in the interests of its

creditors. it is in the interests of the creditors to be paid and the company to be protected from its financial position worsening or being unable to pay its debts.

Further any transactions that the directors may have entered into can be voided such as dispositions of the company's assets at an undervalue. Where the liquidator can evidence and satisfy the court that a transaction, within six years of its completion, was made at an undervalue and sought to defraud creditors of the company was made then the court can void such transaction under section 146 of the Companies Act.

Where a liquidator can evidence that a director continued to trade a company whilst it was insolvent in order to defraud creditors or for any other purpose then the Liquidator may apply for an order that any persons who were knowing parties of the fraud are to make contributions to the company's assets as the court deems fit.

Finally, under section 145 where a payment of disposal of property in the 6 months prior to the deemed commencement of the company's liquidation at a time when the company is unable to pay its debts and is made by the directors in order to favour a specific creditor over other creditors a liquidator can set aside the transaction and the court can make an order for the creditor to return the assets to the company and make a claim in the liquidation.

Commented [BT15]: 6 1/2. Reference to sections 99, 135 and 147 would have been beneficial.

Question 3.2 [maximum 6 marks]

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

Receivership is not an explicitly mentioned type of insolvency proceeding in the Companies Act and Winding-up Rules, though it is provided for by the courts for certain purposes including the collection of money such as rent and for the execution of contracts such as property sales.

There are two prominent types of Receivership appointment, the first is a more widely accepted proceeding that is seen in other jurisdictions. This type of Receivership is commonly incorporated into security documents and is used as a default remedy by secured creditors without court involvement. The powers of the receiver are set out in the security documents and allow the Receiver to take control of the secured assets who can then deal with them in the interests of the secured creditor by either realizing the asset to settle or partially settle the secured creditors outstanding debt or by continuing to operate the asset and collecting rent, in the case of real estate, to service the debt until such time as a sale can be made. In this scenario the Receiver owes it duties to the secured creditor and not to the court.

The other type of Receivership is a little more unique to Cayman and is related to Segregated Portfolio Companies or SPC. A receiver can be appointed over an individual portfolio of a SPC by the courts if the courts are satisfied that the portfolio's assets are insufficient to discharge the claims of creditors in respect of that portfolio. The role is similar to that of a liquidator.

The receivership order from the courts will set out the powers of the receiver and must direct that the receiver orderly closing down of the business of the portfolio and that the distribution of the portfolios assets is made to those entitled to them as their claims are directly attributable to that portfolio.

A receiver cannot be appointed a liquidator is already appointed over the SPC and a Receivers would cease on the appointment of a liquidator to the SPC.

The appointment of receiver over a segregated portfolio allows for a stay of any actions being taken against the SPC in respect of that portfolio unless the court provides leave to do so,

additionally, the directors of the SPC are relieved of their duties as they relate to the segregated portfolio that a receiver is appointed to. |

Commented [BT16]: 6 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?

In respect S&C and the following questions in the scenario, the following could reasonably apply given the case study.

In respect of sub question a, Sparrow as a partially secured creditor would be entitled to take action to enforce its security over the four vessels. If the security contract provides, a Receiver could be appointed in order to take control of the vessels and realize those assets on behalf of Sparrow. In respect of the unsecured element of its loan, Sparrow would be entitled to submit a statutory demand to S&C, and if unanswered or not set aside could then proceed to petition for S&C's winding up.

Regarding sub question b, Roger Jolly could take steps under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) or by commencing an action in Cayman Islands based on the foreign judgment being an unsatisfied debt to have their \$50m award recognised in the Cayman Islands. As the award is a final and a money the court may find in favour of Roger Jolly and allow for the order to be enforceable in Cayman. This would allow Roger Jolly to petition for the winding up of S&C through the Cayman courts following the lapsing of a statutory demand for the \$50m award debt.

Regarding sub question c, the unpaid employees would have the right to petition for the winding up of the Company due to unpaid wages and benefits. In any Liquidation proceeding the employees claims would be considered a preferential and would rank above all other claimants noted in the case study, with the exception of the secured portion of Sparrow's claim and the fees and expenses of conducting the Liquidation itself.

Regarding sub question d, the Cayman Islands courts would have jurisdiction over S&C as the S&C is registered in the Cayman Islands. The Cayman Islands courts have jurisdiction over companies that are either incorporated in Cayman or are incorporated elsewhere and re-registered in Cayman, which S&C meets the criteria of.

Regarding sub question e, S&C could seek to restructure its debts via a scheme of arrangement under section 86 of the Companies Act. A scheme can be arranged between its creditors or a specific class of its creditors or between its members or a specific class of members. The scheme would allow S&C to restructure its debts. Given there are several creditors who could potentially take enforcement action against S&C, they would also need to petition for the appointment of a provisional liquidator in order to benefit from the statutory stay to avoid any creditors from frustrating the scheme.

Regarding sub question f, in a scheme of arrangement S&C management would remain in place and continue to trade the business. As this scenario would require a provisional liquidation appointment also then the question of the management of S&C falls on the powers provided to the provisional liquidator by the order. If the order allows for the provisional liquidator to maintain oversight of the current S&C management in a light touch proceeding then S&C would retain their control though their actions would be subject to oversight and approval by the provisional liquidators.

Regarding sub question g, the court prior to sanctioning the scheme of arrangement would be concerned that S&C has complied with the convening orders, that any classes of creditors where the majority have approved the scheme, that the majority fairly represent that class, and finally that the arrangement would be approved by an intelligent, honest member of the class acting in their own right and reasonably having considered any alternate options.

*** End of Assessment ***

42.5 / 50

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\$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 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]: 3 marks.

Commented [BT22]: 1 mark

Commented [BT23]: 2.5 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.