



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]: Incorrect. Correct answer is D.

Question 1.3

Select the **correct answer**.

In a voluntary liquidation:

- (a) The company may cease trading where it is necessary and beneficial to the liquidation.
- (b) **The company must cease trading except where it is necessary and beneficial to the liquidation.**
- (c) The company must cease trading if it is necessary and beneficial to the liquidation.
- (d) The company may cease trading unless it is necessary and beneficial to the liquidation.

Commented [BT3]: Correct. 1 mark.

Question 1.4

Select the correct answer.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

- (a) A company incorporated in the Cayman Islands.
- (b) A company with property located in the Cayman Islands.
- (c) A company carrying on business in the Cayman Islands.

(d) Any of the above.

Commented [BT4]: Correct. 1 mark.

Question 1.5

Select the correct answer.

In a provisional liquidation, the existing management:

- (a) Continues to be in control of the company.
- (b) Continues to be in control of the company subject to supervision by the court and the provisional liquidator.

(c) May continue to be in control of the company subject to supervision by the provisional liquidator and the court.

Commented [BT5]: Correct. 1 mark.

(d) Is not permitted to remain in control of the company.

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.

Commented [BT6]: Correct. 1 mark.

(d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.

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]: 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?

The register for assets such as real estate, ships, aircrafts, motor vehicles and intellectual property is centrally maintained. Therefore, security can be registered over these types of assets by the Creditor. The jurisdiction does not have any public security registration regime.

Any other type of assets cannot be registered because the Cayman Islands does not have a public security registration regime. There is a requirement for the security interest registered into a register which is maintained by the company at its registered office.

The registration of a security interest in the company's register does not mean the charge will be prioritized. This would only give third parties notice that the charge exist since the register is open for inspection by member of the company or creditors.

Commented [BT12]: 2 1/2 marks. What is the effect of registering a security in a centrally maintained register? 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?

The Cayman Islands Grand Court has the power to assist foreign bankruptcy proceedings. Although the principles of the UNCITRAL Model Law is regarded, the Cayman Islands has not implemented the UNCITRAL Model Law. The Grand court can exercise this through the criteria that is set out in Section 242 of the Companies Act.

Commented [BT13]: 4 marks

The Gran Court is guided by matters which will assure an economic and quick administration of the debtor's estate which is consistent with a) the treatment of all holders of claims, b) the protection of claim holders in the Cayman Islands against any bias and inconvenience in processing claims in foreign proceedings, c) the prevention of preferential or fraudulent nature of property in the debtor's estate, d) the distribution of estate among creditors in accordance with the statutory order of priority, e) the recognition and implementation of security interests created by the debtor, f) the non-enforcement of foreign taxes, fines and penalties, g) comity.

Question 2.3 [maximum 3 marks]

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

The legal framework for the recognition of foreign judgements in the Cayman Islands is set out in Cayman's Common Law. A new action in the Cayman Islands is commenced based on the foreign judgement as an unsatisfied debt or obligation. These types of actions are directed under the Grand Court Rules. Money and non-money judgements; including declaratory judgements are enforceable at common law.

The foreign Judgements Reciprocal Enforcement Act (1996 Revision) does give statutory scheme for the recognition and enforcement of foreign judgements in instances where the judgement comes from a country assures that there is substantial reciprocity when it comes to Cayman Judgements being enforced in their country.

To date, the provisions that this Act provides has only been extended to judgements from the Superior Courts of Australia.

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.

Although there are no statutory obligations on insolvent trading, directors of the company can be held personally liable to the company for any losses which was caused to the company if they are in breach of their fiduciary duties.

The official liquidator of an insolvent company or creditors of the company can bring forth claims against the directors on behalf of the company for breaching their fiduciary duties.

In prospect Properties v McNeill, the Grand Court set a precedent that where a company is insolvent, the directors' fiduciary duty to the company requires them to have regards for the company's creditors.

If the company's intention is to give preference to one creditor over the next creditor, in the form of payment or disposal of property, this would constitute a "voidable preference". The payment would have had to take place within six month of the company's liquidation and during a time when it is unable to pay its bills.

If the directors of the company are trying to defraud creditors, or for any fraudulent purpose, the liquidator can apply to the Court to require the director to contribute to the company's assets as the Court sees fit and proper.

Question 3.2 [maximum 6 marks]

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

Commented [DB14]: Marker missed this question – 3 bonus marks awarded by course leader.

Commented [BT15]: 4 marks. Some good points but the question is an open invitation for the candidate to demonstrate their knowledge of sections 99, 145, 146, 147 etc

This statement is not true.

Receivers are not clearly mentioned in the statutory provisions that deals with insolvency such as Companies Act and CWR. The Grand Court Rules considers that receivers can be appointed by the Court for the purpose of collecting money or to perform other act such as execution of a contract or a document of title.

The Grand Court Rules governs the appointment and duties of a receiver. Order 45 of the Grand Court Rules specifically outlines that receivers may be appointed to enforce court orders for the payment order. Order 51 makes the provision for receivers to be appointed by way of equitable execution.

Receivers are statutorily provided for specifically for Segregated Portfolio Companies (SPC). A receivership order would direct that the SPC's assets must be managed by a receiver for the purpose of the orderly closing down of the business of the segregated portfolio and the distribution of the SPC's assets attributed to the segregated portfolio to those entitled to have an alternative.

The receivership order may not be made if the segregated portfolio company is in the process of being wound-up and should cease to be effective once the commencement of the winding-up of the SPC but without bias to previous acts of the receiver or his agents.

During the time in which an application for a receivership order has been made, no suit, action or other proceedings may be introduced against the SPC in relations to the segregated portfolio in respect of which the receivership was made, unless by leave of the Court. The leave of the Court in that instance can be conditional or unconditional.

Commented [BT16]: 4.5 marks. Don't forget receivers appointed by the security instrument.

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?

Sparrow holds a legal mortgage over four of S&C's largest party boats. Since S&C has defaulted on their payments, this gives Sparrow the right to take possession of the boats and exercise its power boats or appoint a receiver realise the property.

(b) What action can Roger Jolly take to protect its interests?

Jolly Roger cannot anything specifically to protect its interests in the company, if the Company or any creditor applies to the court to impose a stay on criminal proceedings after the prestation of a winding-up petition.

(c) What action can the unpaid employees take against S & C?

Any unpaid employee can petition for the winding-up of the company since any creditor can apply for a Company to be wound-up. According to Section 141 of the Companies Act, unpaid employees have the right be paid their wages, pension, and health insurances once the company is in liquidation. The unpaid employees will be prioritized as a preferential debt which only comes above the amounts due to preferred shareholders.

(d) Does the Cayman Islands Court have jurisdiction over S & C?

Even if S&C was incorporated elsewhere, the company is registered in the Cayman Islands. This gives the Cayman Islands Grand Court jurisdiction over the company.

(e) Is there a legal route via which S & C can protect itself and seek to restructure?

S&C can appoint provisional liquidators through a winding up petition to the Court. The company can use this appointment of a provisional liquidator to present a compromise or arrangement (scheme of arrangement) with its creditors. The appointment will also give the company the protection of an automatic stay. Once an automatic stay is in effect, any actions against S&C would be prohibited from commencing or continuing.

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

If in this case the provisional liquidation is "light touch", the existing management of S&C, the Rackham Family can continue playing a part in managing the company during the restructuring process with the supervision of the provisional liquidator and the Grand Court.

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

The Cayman Court will take into consideration the class compositions, any jurisdictional issues, the adequacy of the scheme document and notice. The Court must be convinced that the scheme document and supporting explanatory statement contain all the

Commented [BT17]: 1 mark. 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]: 0 marks. RJ can apply for recognition and enforcement of the arbitral award since the New York Convention has been extended to the Cayman Islands. The key point is that RJ has to apply to have the judgment recognised in the Cayman Islands. Once it does so, a range of enforcement remedies become available to it, including a charging order, writ of execution, examination of judgment debtor, attachment of earnings, garnishee proceedings and the ability to petition to wind up S&C (since RJ will be an unsecured creditor). If winding up petition has already been filed, there may be a moratorium preventing JR from taking any of the enforcement actions mentioned above in which case it will be left to file a proof of debt for its US\$50m as part of the official liquidation.

Commented [BT19]: 1.5 marks. The unpaid employees can sue S&C for the unpaid debts (provided a winding up petition has not yet been filed). Alternatively, they can apply to wind up under section 92 - 94 Companies Act or apply to apply to appoint provisional liquidators under 104 (if they are concerned about mismanagement or wish to support a court-supervised restructuring). If an order is made that S&C be liquidated, the sums due to the employees rank as preferential debts (section 141) ahead of certain other creditors.

Commented [BT20]: 1 mark.

Commented [BT21]: 2.5

Commented [BT22]: 1 mark

information needed to permit the scheme creditors, if applicable and/or the company's shareholders to make a knowledgeable decision about the proposed scheme.

*** End of Assessment ***

36 out of 50

Commented [BT23]: 1 mark. 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.