



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: **[studentnumber.assessment5C]**. An example would be something along the following lines: 202021IFU-314.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 “studentnumber” 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.**
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6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2021**. 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 **7 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**.

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 [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

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**.

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 [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**.

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 [BT6]: Correct. 1 mark

Question 1.7

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.

Commented [BT7]: Correct. 1 mark

(d) Sums due to depositors (if the company is a bank).

(e) Unsecured debts which are not subject to subordination agreements.

Question 1.8

Select the **correct answer**.

Any payment or disposal of property to a creditor constitutes a voidable preference if it:

(a) 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) 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.

Commented [BT8]: Correct. 1 mark

(c) 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) 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.

Question 1.9

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 [BT9]: Correct. 1 mark

Question 1.10

Select the **incorrect statement**.

A company may be wound up by the Grand Court if the:

(a) company passes a special resolution requiring it to be wound up.

(b) company does not commence business within a year of incorporation.

(c) company is unable to pay its debts.

(d) board of directors decides it is "just and equitable" for the company to be wound up,

Commented [BT10]: Correct. 1 mark

(e) company is carrying on regulated business in the Cayman Islands without a license.

Commented [BT11]: 10/10 for question 1

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Explain the extent to which it is possible to register security over an asset in the Cayman Islands.

It is possible to register security over real estate, ships, aircraft, and intellectual property in the Cayman Islands as there are centralised registers in respect of each of these assets where creditors' mortgage and charge rights can be registered. Registration in respect of land is governed by the Registered Land Law (2018 Revision), registration in respect of ships is governed by the Maritime Authority Law (2013 Revision), registration in respect of aircraft is governed by the Civil Aviation Authority Law (2015 Revision) and Mortgaging of Aircraft Regulations 2015.

Commented [BT12]: 2 marks. To earn the final mark, the candidate needed to demonstrate an understanding of 'priority'.

However, save for those assets mentioned in the previous paragraph, there are no general asset registries in the Cayman Islands and creditors. As such, any new potential security holders should review a company's register of mortgages and charges, which pursuant to section 54 of the Companies Law (2018 Revision), is required to be maintained with mortgages and charges of the debtor company, before providing finance and taking new security over an asset.

Question 2.2 [maximum 4 marks]

Explain the legal basis for the Cayman Islands Grand Court's power to assist foreign bankruptcy proceedings and the circumstances in which such powers may be exercised.

The power of the Cayman Island's Grand Court to assist foreign bankruptcy proceedings is a power derived from Part XVII of the Companies Law (2018 Revision) (specifically, s.240-281).

Section 241 of the Companies Law (2018 Revision) provides that the Grand Court may make an order "*ancillary to a foreign bankruptcy proceeding*" following an application of a "*foreign representative*".

Section 240 of the Companies Law (2018 Revision) defines a "*foreign bankruptcy proceeding*" is defined to include "*proceedings for the purpose of reorganising or rehabilitating an insolvent debtor*" and a "*foreign representative*" is defined as "*a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding*"

The criteria upon which the Grand Court may exercise its discretion in order to assist a foreign bankruptcy proceeding is outlined in section 242 of the Companies Law (2018 Revision), and provides that, "*the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with-*

- (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 Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;*

- (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
- (d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;
- (e) the recognition and enforcement of security interests created by the debtor;
- (f) the non-enforcement of foreign taxes, fines and penalties; and
- (g) comity."

If the court is satisfied that the criteria in section 242 are satisfied then it may make an order pursuant to section 241(1) of the Companies Law (2018 Revision) "for the purposes of-

- (a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
- (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- (c) staying the enforcement of any judgment against a debtor;
- (d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
- (e) ordering the turnover to a foreign representative of any property belonging to a debtor."

Commented [BT13]: 4 marks

Question 2.3 [maximum 3 marks]

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

There are no treaties pursuant to which the Cayman Islands has entered into which provide for the recognition or enforcement of foreign judgments. Additionally, the Caymans Islands is not a signatory to any international conventions or agreements providing for the reciprocal recognition (or enforcement) of judgments.

Commented [BT14]: 3 marks

In terms of statute, whilst the Foreign Judgment Reciprocal Enforcement Law (1996 Revision) provides for the recognition or enforcement of foreign judgments on the basis of reciprocity this has only been extended to provide for the judgments emanating from the Superior Courts of Australia and its External Territories. However, pursuant to Order 71 of the Grand Court Rules, the foreign judgment must be (i) final, (ii) a money judgment, and (iii) made after the Foreign Judgment Reciprocal Enforcement Law (1996 Revision) was extended to the foreign country in question.

In light of the absence of any applicable treaties, and the limited utility of the Foreign Judgment Reciprocal Enforcement Law (1996 Revision), common law routes are typically used to provide for the recognition and enforcement of foreign judgments, which, pursuant to *Bandone v Sol Properties* 2008 CILR 301, may include money and non-money judgments.

As a matter of common law, the Cayman Islands Court will consider if the foreign judgment is a valid judgment and whether the judgment ought to be enforced in the Cayman Islands. The requirements for the recognition and enforcement a foreign judgment pursuant to the common law of the Cayman Islands are: (i) the judgment is final and conclusive, (ii) the foreign court which issued the judgment had jurisdiction over the debtor and be of competent jurisdiction, (iii) the judgment was not obtained by fraud, (iv) the judgment is not contrary to Cayman Island's public policy, and (iv) the judgment was not obtained contrary to natural justice or be penal in nature.

Under the common law, a judgment of a foreign court is treated as evidence of an obligation on the judgment debtor thereby creating a debt between the parties to that action. Ultimately the judgment becomes capable of being enforced in the Cayman Islands under the common

law principles of the law of obligations. In order to enforce a judgment in these circumstances, the foreign judgment creditor will be required to commence a fresh debt action in the Cayman Islands Court reliant on the non-payment of the foreign judgment debt. As this is a simple contract debt claim, a limitation period of six years from the date of the foreign judgment will apply. The Cayman Islands Court is not required to re-examine the merits of the underlying foreign proceedings but will simply require the plaintiff/s to establish that there is a valid final judgment from a court of competent jurisdiction upon which the debt is owing. It is therefore unusual for there to be substantive issues of fact or law to be established at trial and the new debt claim proceeding in the Cayman Islands will commonly be disposed of by summary judgment (see *Lakatamia Shipping Company Ltd v Su* [2017] 1 CILR 416)

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, the Cayman Islands is ill-equipped to deal with directors who wilfully disregard the interests of creditors.

Critically discuss this statement and indicate whether you agree or disagree with it, providing reasons for your answer.

Commented [BT15]: A thorough answer. 9 marks.

The Cayman Islands is very well equipped to deal with directors who willfully disregard the interests of creditors. The reason for this can be found in the spectrum of legislation and common law that support creditors' interests to facilitate the initiation of insolvency proceedings in order to wrestle power away from any "offending" directors, and, following the commencement of insolvency proceedings, to rectify and redress the actions of any offending directors.

Creditors' Powers to Initiate Insolvency Proceedings

Where creditors suspect that a director may not be acting in their interest they may pursue:

- provisional liquidation pursuant to section 104 of the Companies Law (2018 Revision);
- official liquidation pursuant to section 92 of the Companies Law (2018 Revision);

Provisional Liquidation

In relation to provisional liquidation pursuant to section 104 of the Companies Law (2018 Revision), an application may be made for the appointment of a provisional liquidator by a creditor of a company on the grounds that:

- "(a) there is a prima-facie case for making a winding up order; and*
(b) the appointment of a provisional liquidator is necessary in order to-
(i) prevent the dissipation or misuse of the company's assets;
(ii) prevent the oppression of minority shareholders; or
(iii) prevent mismanagement or misconduct on the part of the company's directors."

If the test for a provisional liquidation is satisfied, which also includes establishing that the company is "unable to pay its debts" under section 93 of the Companies Law (2018 Revision) the Court will appoint a provisional liquidator over the company. Whilst in "light-touch" provisional liquidations the existing directors and management of a company is permitted to carry on in their roles subject to the supervision of the provisional liquidators and the Grand Court, in all other cases the powers of the directors are replaced by the provisional liquidator. As such, if a creditor considers that a director is disregarding their interest and is able to satisfy the test in sections 93 and 104 of the Companies Law (2018 Revision), then it is well served by the provisional liquidator appointment laws currently in place in the Cayman Islands.

Official Liquidation

In relation to official liquidation pursuant to section 92 of the Companies Law (2018 Revision), an application may be made for the appointment of an official liquidator by a creditor of a company (see section 94(b) of the Companies Law (2018 Revision)) on the grounds that, amongst other things, (i) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year; (ii) the company is unable to pay its debt, or (iii) the Court considers it is "just and equitable" to wind up the company.

As such, if a creditor considers that their interests are being negatively impacted by such actions then it can apply for an official liquidation. Moreover, in relation to "just and equitable grounds", this may include mismanagement of the company by the directors. Therefore, if a creditor considered their interests were been damaged simply by company mismanagement then it could apply for the company to be wound up.

If sanctioned by the Grand Court, then an official liquidator will be appointed and will replace the directors of the board. Following their appointment the liquidators will seek to realise and distribute assets of the company and to investigate the affairs of the company.

Where an official liquidator has been appointed then they have the right, pursuant to section 110(2)(a) of the Companies Law (2018 Revision) to "make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable." As such, if a creditor thought that they were being dealt with unfairly by a director then it could apply to the Court to wind up on the company upon "just and equitable grounds" and then seek to reach an arrangement with the newly appointment official liquidator in respect of its interests.

Alternatively, the Grand Court can make orders regarding the management of the company in order to redress substantiated concerns of minority shareholders.

Rectify And Redress The Actions Of Any Offending Directors

There are two key mechanisms which creditors can use rectify and redress the actions of any offending directors:

- avoidance of property dispositions pursuant to section 99 of the Companies Law (2018 Revision);
- voidable preferences pursuant to section 145 of the Companies Law (2018 Revision); and
- avoidance of dispositions made at an undervalue pursuant to section 148 of the Companies Law (2018 Revision).

Avoidance of Property Dispositions

Pursuant to section 99 of the Companies Law (2018 Revision) any disposition of a company's property made after a winding up petition (including in relation to the appointment of provisional or official liquidators) is filed will be void if the winding up petition is eventually granted (unless sanctioned by the Grand Court). As such, if a creditor applies to the Grand Court to wind up the company then it can do so knowing that following the commencement of the winding up the directors of the company will not be able to dispose of the company's property which may (likely) negatively impact the creditor's interests.

Voidable Preferences

Pursuant to section 145 of the Companies Law (2018 Revision) any payment or disposal of the company's property to a creditor would be considered a voidable preference if (i) it occurs within six months before the (deemed) commencement of the company's liquidation, (ii) is at a time when the company is unable to pay its debts, and (iii) it can be established that the dominant intention of the company's directors was to give the recipient creditor a preference over other creditors. As such, if a creditor considers that it has been unfairly treated by the directors of a company by way of the directors entering into transactions with other creditors such as to prefer them, then the "victim" creditor can apply to court for a winding up order (see above), and, if this is successful then and preference transactions will be void and the appointed liquidator may apply to the Grand Court for an order seeking the return of the subject asset/property/money.

Undervalue

Pursuant to section 146 of the Companies Law (2018 Revision) any transaction where the property has been disposed of at an undervalue with the intention defraud creditor is a voidable transaction upon the application of an appointed liquidator. The "look back" time for undervalue transaction is a six year period from the date of the disposal and, therefore, a creditor can use their rights to seeking the winding up of the company; the appointment of a liquidator; and then to work with the appointed liquidator to inspect the company's affairs (sections 104 (provisional liquidator) and section 110 (official liquidator)) to inspect previous transactions and then seek to have these transactions voided.

Conclusion

As such, whilst there may not be a statutory prohibition on insolvent trading, and this may be something that is developed in the future, the Cayman Islands is not ill-equipped to deal with directors who wilfully disregard the interests of creditors as it is the case that creditors have a plethora of legal mechanisms at their disposal to check the power and actions of "offending" creditors including in relation to seeking their removal from office and the remedy and redress of any actions that have occurred which may be contrary to their interests.

Question 3.2 [maximum 6 marks]

Receivers have a limited role to play in a Cayman Islands insolvency scenario. Discuss.

Commented [BT16]: 6 marks.

Receivers have a well-defined and incredibly useful role to play in the insolvency tapestry of the Cayman Islands. Specifically, Receivers play a role in three key areas of Cayman Islands insolvency regime:

- Grand Court Rules
- Segregated Portfolio Companies
- Creditor Actions

Grand Court Rules

In relation to the Grand Court Rules:

- Order 30 of the Grand Court Rules provides for the appointment and the duties of a Grand Court-appointed Receiver.
- Order 45 of the Grand Court Rules provides that a Receiver may be appointed to enforce court orders in respect of the payment of monies due and owing.

- Order 51 of the Grand Court Rules provides that a Receiver may be appointed by way of equitable execution.

In relation to Order 45, Receivers can be appointed to, amongst other things, assist with the enforcement of a judgment debt including in relation to the possession of land, the delivery of goods.

In relation to Order 51, Receivers can be appointed and used to enforce judgment debts where an equitable execution order prevents a debtor from receiving the income affected by the order and authorises the receiver to collect that income and pay essential expenses connected to the relevant property or asset.

Segregate Portfolio Companies

Receivers have a defined role in respect of Segregated Portfolio Companies ("SPC") which are a particular type of Cayman legal entity which is permitted to have distinct portfolios for different assets and liabilities, each ring-fenced from one another.

If the Cayman Grand Court considers that a particular SPC's assets in respect of one of its portfolios are insufficient to satisfy the liabilities of that portfolio then the Grand Court may appoint a Receiver over that portfolio.

In this situation, the Receiver is given wide powers (section 226(1) Companies Law (2020 Revision) and its role is to close down the portfolio's business (section 224(3) Companies Law (2020 Revision) and, in doing so, make distributions of the portfolio's assets. Indeed, the role and powers of a Receiver appointed in respect of a portfolio of a SOC received clarification in the Matter of JP SPC 1 and JP SPC 4 (known as Axiom) 2013 (1) CILR 330 where it was held that a Receiver of a portfolio would have the power and duties attributed to those of a liquidator of a Cayman company.

SPC have been around for over 20 years in the Cayman Islands, and are an ongoing feature of the commercial landscape. As such, as and when SPC fall into distress it is likely that Receivers will be appointed and therefore their role is very important in this regard.

Creditor Actions

The holder of a fixed or floating charge can, if the relevant charging document allows them to do so, appoint a Receiver over the subject company's assets (those that are charged) if a default occurs.

If an appointment is made, the Receiver is permitted to act pursuant to the powers set out in the charge document, which ordinarily includes a right of sale and may include the right of foreclosure or enforcement of an immediate right to possession.

The role of the Receiver is generally to realise proceeds from the charged asset and distribute this to the creditors in respect of any amount of unpaid debt.

Importantly, in this situation, a Receiver is not sanctioned/supervised by the Grand Court and owes their duties primarily to the creditor, not the defaulting company.

QUESTION 4 (fact-based application-type question) [maximum 15 marks in total]

Black Pearl Ltd is a company registered in the Cayman Islands. It operates a fleet of pirate-themed cruise ships across the Caribbean. It was founded by the wealthy Sparrow family over 75 years ago. The family continues to own and manage the business.

In recent years, Black Pearl has been rapidly expanding its cruise ship operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to Covid-19 has badly affected Black Pearl's revenues.

Within weeks Black Pearl is going to default on its loan repayments to Monster Mortgage (Monster). Monster has lent Black Pearl USD 100 million (USD 40 million of which is secured by a mortgage over four of Black Pearl's cruise ships).

Black Pearl has already failed to pay various service providers for several months (tender vessels, food and beverage suppliers, utilities, engineers and mechanics). The payment of utilities is particularly important to the ongoing repair and maintenance of the fleet of vessels at Black Pearl's dry dock facility in Little Cayman.

To make matters worse, Black Pearl has recently lost arbitration proceedings in London in relation to the construction of a new fleet of ships and been ordered to pay damages of USD 50 million to Jolly Roger Inc. It will not be 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 Monster take to protect itself?

Commented [BT17]: 2.5 marks

Monster is a secured creditor in respect of USD 40 million of the total debt owed by Black Pearl ("Secured Amount"), and is an unsecured creditor in respect of USD 60 million of its total debt owed by Black Pearl ("Unsecured Amount").

In respect of the Secured Amount, Monster should, in the first instance, review the mortgage documents over the four Black Pearl cruise ships to see what rights it has pursuant to those mortgages upon a repayment default. It is likely that the mortgage provides for the right of possession and the exercise of sale of the four ships and, if so, then Monster would be well advised to act accordingly to realise as much value as possible from the four cruise ships.

Additionally, the mortgage charges may include a contractual right to receivership upon payment defaults. If so, Monster could consider appoint a receiver over the four ships who would act under the powers in the charge documents (which typically includes a right of sale) and could then look to realise the value of the ships and repay Monster the amount of the unpaid debt i.e. USD 40m.

In respect of the Unsecured Amount, Monster will be considered an unsecured creditor. Following the repayment default Monster could consider sending a notice of default and demand for repayment. On the basis that this is unlikely to be satisfied given Black Pearl's impecuniosity then Monster could consider suing Black Pearl for breach of contract. Additionally, Monster could consider making an application to court for either a provisional liquidator or an official liquidator pursuant to sections 104 and 94 of the Companies Law (2018 Revision), respectively. The difference between the two forms of liquidation application is principally that provisional liquidations are used to preserve and protect a company's assets in order to facilitate a compromise with the company's shareholders whereas an official liquidation application is more suited to see the winding up of the company with the company's assets being monetised and distributions made to creditors to satisfy, at least in part, outstanding debts.

As such, and on the basis that the fact pattern does not suggest any scenario where Black Pearl's shareholders would possibly inject capital into the business, the likely prudent next step would be to make an application for winding up and the appointment of an official liquidator whose role it would be to wind up Black Pearl, sell off its assets, and distribute those amounts received to creditors, including Monster.

(b) What action can Jolly Roger Inc take against Black Pearl?

Jolly Rogers should seek to utilise section 72 of the Arbitration Law (2012 Revision) and section 5 of the Foreign Arbitral Awards Enforcement Law, (1997 Revision) which provides, with the leave of the Cayman Court, that its arbitral award from London can be enforced in the same manner as a Cayman Islands court order/judgment.

Commented [BT18]: 2 marks

In order to have its London arbitral award recognised in the Cayman Islands, pursuant to section 6 of the Foreign Arbitral Awards Enforcement Law, (1997 Revision), Monster will need to produce:

- (a) the duly authenticated original award or a duly certified copy of it;
- (b) the original arbitration agreement or a duly certified copy of it; and
- (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Once the arbitral award has been recognised and capable of enforcement in the Cayman Islands then Jolly Roger needs to decide what steps it wishes to take. One such step couple be to utilise Order 45(1) of the Grand Court Rules to apply for an appointment of a receiver in order to enforcement a judgment which provides for the payment of monies.

Alternatively, Jolly Roger could proceed to apply for the winding up of Black Pearl and the appointment of an official liquidator owing to the fact, pursuant to section 93(b) of the Companies Law (2018 Revision) that as a judgment debtor it is a creditor of Black Pearl and, if the debt remains unpaid, then this would establish that the company is unable to pay its debts.

(c) What action can the unsecured trade creditors take against Black Pearl?

Commented [BT19]: 2 marks

Any unsecured trade creditors can apply for the official liquidation of Black Pearl and the appointment of an official liquidator. Black Pearl is a company registered in the Cayman Islands, and the trade creditors have proper standing to bring such an application under section 94(1)(b) of the Companies Law (2018 Revision).

In order to wind up Black Pearl the trade creditors will need to establish that Black Pearl is "unable to pay its debts" which it can do so if their debts exceed KYD 100 having been demanded and remaining outstanding for 21 days. The onus will be on the unsecured trade creditors to establish this. Once an official liquidation has been approved the official liquidators will displace Black Pearl's board of directors and will control the company. The unsecured creditors can then submit a proof of debt claim for the official liquidator's review which should show the details of the amounts and interest owed, including the basis of the debt and necessary documentation. If the official liquidators accept the claim then, once the official liquidators have realised value from Black Pearl's assets, it will pay off Black Pearl's creditors as per the order of priorities. As unsecured creditors, they will be paid after, liquidation expenses, secured debts, sums due to employees and also Cayman taxes. As such, depending on the amount of money on other debts of Black Pearl, it is likely that the unsecured trade creditors will only receive a few cents in the dollar of their debt.

(d) Does the Cayman Islands Court have jurisdiction over Black Pearl?

Yes, pursuant to section 91(b) of the Companies Law (2018 Revision) the Courts of the Cayman Islands has jurisdiction over Black Pearl as Black Pearl is imported in the Cayman Islands.

Commented [BT20]: 1 mark

(e) Is there a legal route via which Black Pearl can protect itself and seek to restructure?

There are a number of different routes that Black Pearl could take to seek to restructure itself.

Firstly, and whilst the Cayman Islands does not have formal restructuring regime, Black Pearl could utilise section 104(3) of the Companies Law (2018 Revision) to make an application for a provisional liquidator in order to present a compromise arrangement to its creditors with a view to preserving and protecting the company's assets. A provisional liquidation order will give Black Pearl the protection of an automatic stay pursuant to section 97 of the Companies Law (2018 Revision); save that this will not be binding on secured creditors who can continue to enforce their security throughout the provisional liquidation. Additionally, once a provisional liquidation order is made the joint provisional liquidators will be appointed by the court but, given it will be Black Pearl's application, these can be persons who are in agreement with the plan to seek an agreement and work-out with the creditors; especially hat in a provisional liquidation the existing management of Black Pearl will be allowed to continue in their rules (subject to supervision). In this time Black Pearl can negotiate a compromise of its debt with its creditors and if successful then the winding up petition can be dismissed and Black Pearl can continue to operate.

Another option is for Black Pearl to apply to the court for a Scheme of Arrangement pursuant to section 86 of the Companies Law (2018 Revision). Under a Scheme of Arrangement, and if the company receives the support of over 50% in number representing 75% in value of each class of creditors present and voting at the Scheme Meeting, and if sanctioned by the Court, the Black Pearl can restructure its debts. On the facts, it's likely that Black Pearl will have at least two classes of creditors: secured creditors (e.g. Monster), and unsecured creditors (e.g. the trade creditors and Jolly Roger). However, in the Cayman Islands there is no cross-class cram down and so each class of creditor must approve the Scheme (i.e. more than 50% representing 75% in value of each class). Once the Grand Court approves the Scheme, after the Convening Meeting and the Scheme Meeting (where voting occurs), then the Scheme becomes effective and concludes once all its terms have been complied with.

Commented [BT21]: 3.5 marks

(f) Following on from (e) above and assuming there is a legal route via which Black Pearly can protect itself and seek to restructure, can the Sparrow family continue to run Black Pearl during this process?

If Black Pearl is not in provisional liquidation then the Sparrow Family will be able to continue to manage the company through the Scheme of Arrangement process.

However, if Black Pearl is subject to provisional liquidation proceedings then it will be for the Grand Court to determine whether to allow the Scheme Family to continue in their management roles or whether to appoint provisional liquidators to replace them. However, it is likely that they will be able to continue in their roles if the provisional liquidation is "light touch"; it all depends on the facts of the case and the application of court's discretion.

Commented [BT22]: 1 mark

(g) Assuming that the Cayman Islands Court has jurisdiction, what factors will the court take into consideration before approving any proposed restructuring?

In relation to a Scheme of Arrangement, in order for a court to be able to approve it then it will be necessary for more than 50% in number representing 75% in value of each class of creditors present and voting at the Scheme Meeting to approve the Scheme. Once this is obtained then the Court will look at the Scheme in the "Sanction Hearing". At this hearing the Court will consider whether all the directions from the Convening Order has been complied with and whether the Scheme, compared to other options, is a sound proposal to approve.

Commented [BT23]: 2 marks

Commented [BT24]: 14 marks for question 4.

*** End of Assessment ***

Commented [BT25]: Total marks for this candidate =48