



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.

Centrally held ownership registers are maintained in the Cayman Islands in respect of real estate, ships, aircraft, motor vehicles and intellectual property, in which mortgages and charges over such assets may be registered. Upon registration, any third party purchaser will be deemed to have notice of any such interest and will therefore, acquire such asset subject to the secured creditor's interest.

Commented [BT12]: 3 marks.

However, no public security regime exists in the Cayman Islands in respect of other assets. Accordingly, a creditor must take appropriate steps to ensure that he (or she) has adequate control over secured assets to prevent a third party purchasing it (without notice of their interest) (e.g. by registering such interest in the debtor company's register of mortgages and charges).

In this regard, Section 54 of the Companies Act (2021 Revision) provides that each company shall be required to keep at its registered office, a register of all mortgages and charges in respect of the property of the company, which shall include a short description of the property mortgaged or charged, the amount of charge created and the names of the mortgagees or persons entitled to such charge.

The register of mortgage and charges is open to inspection by any creditor or member of the company at all reasonable times – accordingly, registration of the mortgage or charge in the company's register of mortgages and charges will put third parties on notice of such security interests.

The failure to record any mortgage or charge in the company's register of mortgages and charges will not, alone, invalidate any security interests purportedly created under such mortgage or charge.

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 Cayman Islands has not implemented the UNCITRAL Model Law on Cross-Border Insolvency. However, a number of the principles engaged thereunder are followed. Furthermore, the Cayman Islands, notwithstanding that it is a British Overseas Territory, is not a member of the European Union, hence the European Insolvency Regulation (Recast) does not apply.

Part XVII of the Companies Act (2021 Revision) sets out the powers of the Grand Court to make orders in support of foreign insolvency proceedings (including foreign bankruptcy proceedings).

The Grand Court's assistance is not contingent upon the satisfaction of any threshold test, nor are there automatic rights based on the centre of main interests of the debtor company. Rather, Part XVII of the Companies Act provides that "*upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding*" for certain purposes. Each of the terms "foreign bankruptcy proceeding" and "foreign representative" and "debtor" are broadly defined – capturing any proceedings for the purpose of reorganising or rehabilitating an insolvent debtor in the country in which it is incorporated or established.

The orders which the Grand Court may make include: recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of the debtor company; staying the commencement or continuation of legal proceedings against a debtor company; and requiring a person in possession of information relating to the business or affairs of a debtor company to be examined by and produce documents to the foreign representative, etc.

Such orders may be made against the debtor company or any person who is a relevant person as defined in Section 103(1) of the Companies Act – namely, any person who has made or concurred with the statement of affairs, is or has been a director of the debtor company, is or was a professional service provider to the debtor company, has acted as a controller, advisor or liquidator of the debtor company or receiver or manager of its property, is or has been concerned in or has taken part in the promotion or management of the debtor company.

The foreign representative must satisfy the Grand Court that it is appropriate for the Court to exercise its discretion by granting the relief sought in its application.

In determining whether to make such ancillary orders, the Grand Court will be "guided by matters which will ensure an economic and expeditious administration of the debtor's estate", consistent with: the just treatment of all holders of claims against or interest in debtor company's estate, wherever they may be domiciled; the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding; the prevention of preferential or fraudulent dispositions of property comprised in the debtor company's estate; the distribution of the debtor company's estate among creditors substantially in accordance with the statutory order of priority (as set out in Part V of the Companies Act); the recognition and enforcement of security interests created by the debtor company; the non-enforcement of foreign taxes, fines and penalties; and comity (being the mutual recognition and co-operation concerning legal decisions).

Furthermore, Order 21 of the Companies Winding Up Rules, 2018 provides for the establishment of international protocols between Cayman Islands official liquidators and foreign officeholders – notably, Order 21 does not provide for such protocols to be established between the Grand Court and the relevant foreign officeholder, although any protocol must be approved by the Grand Court.

Question 2.3 [maximum 3 marks]

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

The Cayman Islands is not party to any international treaties for the reciprocal recognition or enforcement of foreign judgments, nor has the United Kingdom extended its ratification of any

Commented [BT13]: s.242 Companies Act.

Commented [BT14]: 3.5 marks

Commented [BT15]: 3 marks

such treaties to the Cayman Islands (as a British Overseas Territory) by Order in Council (save for the New York Convention on Recognition and Enforcement of Arbitral Awards). Moreover, the Cayman Islands is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

However, the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides for a statutory scheme for recognition and enforcement of foreign judgments *provided* that substantial reciprocity of treatment will be assured in respect of the enforcement of Cayman Islands judgments. To date, these provisions have only been extended to judgments of the Superior Courts of Australia.

In summary, the Foreign Judgments Reciprocal Enforcement Act provides that any applicable judgment must be: (i) final and conclusive (as between the parties thereto); (ii) is a money judgment; and (iii) was given after the Foreign Judgments Reciprocal Enforcement Act (i.e. 1996) and the order directing that the law be extended to that foreign country (see Section 3).

The applicable process is set out in Order 71 of the Grand Court Rules - a judgment creditor may apply to the Grand Court within 6 years of an applicable judgment being made (or where appeal proceedings have taken place, after the date of the last judgment) to have the judgment registered in the Grand Court, whereupon it shall have the same force and effect for the purposes of execution as if it had originally been made by the Grand Court (as the registering court). In certain circumstances, the judgment shall not be registered (e.g. where it has been wholly satisfied as at the date of application; or if it could not be enforced by execution in the originating country).

Accordingly, the Foreign Judgments Reciprocal Enforcement Act is of limited application and the enforcement of foreign judgments is more usually achieved by commencing a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation. Such actions are commenced by way of ordinary litigation. Once a local judgment has been obtained, all domestically available enforcement procedures are available.

As a matter of common law, money and non-money judgments (including declaratory judgments) are enforceable at common law (see *Badone v Sol Properties 2008 CILR 301*, which case confirmed that in personam judgments may be recognised and enforced by equitable remedies or the principle of comity, as required).

In order for a foreign judgment to be recognised and enforced at common law, the following mandatory requirements must be satisfied/fulfilled: (i) the judgment must be final; (ii) the foreign court (i.e. originating court) must have had jurisdiction over the debtor; (iii) the foreign judgment must not have been obtained by fraud; (iv) the foreign judgment must not be contrary to public policy in the Cayman Islands; (v) the foreign judgment must not have been obtained contrary to the rules of natural justice.

In each case, a six year limitation period applies (i.e. for common law enforcement and registration under the Foreign Judgments Reciprocal Enforcement Act), such period running from the date of the judgement or, if appeal proceedings have been pursued, the date of the last judgment.

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.

As a matter of Cayman Islands law, there is no statutory obligation upon the company, its directors and/or management (or any other person) to file for insolvency, nor does the Companies Act (2021 Revision) (the "**Companies Act**") contain a prohibition on wrongful or insolvent trading (that is the continuation of trading whilst a company is insolvent).

However, notwithstanding such lack of statutory prohibition and/or penalties, arguably creditors are protected by directors' fiduciary duties and resulting liability. In particular, if a company is or is likely to be insolvent, the directors must have regard as to whether (or not) it is appropriate for insolvency proceedings to be instigated.

Prior to the onset of insolvency and where a company is a going concern, directors of a company owe fiduciary duties to and are required to have regard to the interests of the company's shareholders as a whole. However, where a company encounters financial difficulties, and in particular if the company is insolvent or of doubtful insolvency, then the directors are also required to have regard to the interests of the creditors.

See in *Prospect Properties Limited (In Liquidation) v. McNeill and J.M. Bodden II* [1990-91] CILR 171, which approved the New South Wales Court of Appeal decision in *Kinsela v. Russell Kinsela Pty Ltd* (1986) 4 ACLC 215 at 223, where it was held: "*In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise ... But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholder's assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration*".

If a debtor company is or is likely to be insolvent, it will be in the interests of the creditors to be paid in full and for the directors to take all appropriate action to ensure that the debtor company is in a position to pay all creditors in full (i.e. no inappropriate disposition of assets is made and/or the debtor company does not continue to trade (and thereby lose money)). Accordingly, it may be a breach of the directors' fiduciary duties if they fail to commence insolvency proceedings.

Although there is no point prescribed by Cayman Islands law at which a debtor company must enter a restructuring or insolvency process, as a matter of common law, the directors can be made personally liable (to an unlimited extent) to the debtor company for any losses which they cause to be incurred by the debtor company if they breach their fiduciary duty to act in the best interests of the company, and notwithstanding that the director himself made no personal gain (e.g. by incurring additional liabilities where they knew or ought to have known that there was no reasonable prospect of the company avoiding insolvent liquidation).

Critically, no direct cause of action will accrue to creditors as a consequence (unless the directors voluntarily assumed a direct duty to any such creditor) – i.e. creditors are not able to pursue claims against directors in respect of any losses incurred by the company and/or the creditors as a result of the directors' breach of fiduciary duty (see *Yukong Lines Ltd of Korea v Rendsburg Investment Corp* [1988] BCC 870, an English decision). However, once a company is in official liquidation, claims against a company's directors for breach of fiduciary duty to the debtor company may be pursued by the official liquidation (in the name of the company).

Therefore, notwithstanding a lack of statutory provision in respect of 'wrongful' or 'insolvent trading' pursuant to Cayman Islands legislation, creditors may be adequately protected against ongoing trading by a debtor company – which results in the dissipation of assets, which would otherwise be available to satisfy their claims against the debtor company – as a result of the imposition of fiduciary duties on directors of debtor companies and the resulting liability on directors to account for any such losses personally.

However, it should be noted that it is common for the articles of association of Cayman Islands companies to indemnify and hold harmless directors in respect of liability for non-intentional wrongdoing – which may prevent and/or restrict any such **claims**.

Commented [BT16]: 6 marks. Some good points here. Specific reference might also have been made to sections 99, 135, 145, 146, 147 Companies Act.

Question 3.2 [maximum 6 marks]

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

In circumstances where a debtor company is in financial distress, secured creditors have a variety of options – restructuring, enforcement or insolvency – to pursue and recover (as applicable) outstanding monies owed to them by debtor companies (in default). One such option is the use of receivers.

Commented [BT17]: 6 marks

There are no specific statutory provisions governing receivership appointments under security documents, as a matter of Cayman Islands law. However, receivers may be appointed by secured creditor(s) over a charged asset for the purpose of enforcing a secured creditor(s)' rights under a security document, in accordance with the terms of that security document (e.g. upon default by the debtor company).

The receiver will have the powers granted to him under the terms of the relevant security documents, and this will typically include the right of sale of the charged asset the subject of the security. Typically a receiver will realise the value of the charged asset and repay the secured creditor the amount of the unpaid debt. Critically, a receiver's primary duty will be to the secured creditor(s), as opposed to the general body of creditors and will not be subject to the supervision of the Grand Court of the Cayman Islands.

Historically, receivership was only available where other usual means of execution were unavailable to secured creditors. However, in addition to the appointment of a receiver by way of a contractual security document, the Grand Court Rules do contemplate that receivers may be appointed by the Grand Court for the purposes of collecting money (e.g. rent) or some other act (e.g. execution of a contract). In particular:

- (i) Order 30 of the GCR provides for the appointment of a receiver against judgment debtors;
- (ii) Order 45 of the GCR provides for the appointment of a receiver to enforce Court orders for the payment of money; and
- (iii) Order 51 of the GCR provides for the appointment of receivers by way of equitable execution, in such circumstances, a receiver will have the right to identify, investigate and recover specified property over which the applicant provides to have an equitable interest.

Receivers and receivership orders are specifically provided for by status in respect of segregated portfolio companies (or "SPCs") – a single entity, which is permitted to create separate 'portfolios' for assets and liabilities, each of which is ring-fenced by states from other portfolios (and the assets and liabilities thereto). Pursuant to Section 224 of the Companies

Act (2021 Revision) (the "**Companies Act**"), if the Grand Court is satisfied that the assets attributable to a particular segregated portfolio are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio, and that a receivership order would achieve: (i) the orderly closing down of the business of or attributable to the segregated portfolio; and (ii) the distribution of the assets attributable to such segregated portfolio to those entitled to them, then a receivership order may be made in respect of such portfolio. Notably, any such order for the appointment of a receiver of a portfolio may not be made if the SPC is in the process of being wound up and/or shall cease to be of effect upon commencement of the winding up of the SPC.

Accordingly, there are a broad range of circumstances in which a receiver may be appointed as a matter of Cayman Islands law.

A receiver may also make an application to the Grand Court to seek further powers, as may be necessary, including the powers of investigation (similar to those available to a liquidator) and directions. This makes receivership a potentially very powerful tool for secured creditors.

Whilst, the use of receivers has been less frequent in more recent years – this is largely due to the perception that the process can be slow, costly and inflexible - receivership may offer a valuable alternative to the standard methods of recovery under the Cayman Islands insolvency regime and may, in certain circumstances, be a more appropriate enforcement mechanism for secured creditors. In particular, receivership appointments can be a useful enforcement tool to secure and monitor the potential dissipation of assets quickly, rather than trying to pursue other recovery methods (e.g. winding up of a debtor company) which may not be appropriate due to time and/or cost concerns, asset protection etc.

Accordingly, I do not accept the proposition that receivers have a limited role to play in a Cayman Islands insolvency scenario.

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?
- (b) What action can Jolly Roger Inc. take against Black Pearl?
- (c) What action can the unsecured trade creditors take against Black Pearl?
- (d) Does the Cayman Islands Court have jurisdiction over Black Pearl?
- (e) Is there a legal route via which Black Pearl can protect itself and seek to restructure?
- (f) Following on from (e) above and assuming there is a legal route via which Black Pearl can protect itself and seek to restructure, can the Sparrow family continue to run Black Pearl during this process?
- (g) Assuming that the Cayman Islands Court has jurisdiction, what factors will the court take into consideration before approving any proposed restructuring?

Commented [BT18]: Strong answer overall. 14 marks.

What action can Monster take to protect itself?

According to the fact pattern above, Monster has the benefit of a mortgage over 4 of Black Pearl's cruise ships, in respect of a portion of the loan advanced by Mortgage to Black Pearl (in the amount of US\$40 million). It is assumed for these purposes that such security was properly granted (i.e. made by way of deed and validly executed) and was validly registered on the respective vessel registry pursuant to the Maritime Authority Law as well as in the register of mortgages and charges of Black Pearl (as required by Section 54 of the Companies Act (2021 Revision)). Assuming no other security was granted, Monster will be an unsecured creditor for the balance of the loan including any interest (in the amount of US\$60 million).

It is understood that Black Pearl will shortly be (but is not yet) in default of its loan repayments to Monster. It is not clear from the fact pattern above whether Black Pearl may be in default of the loan agreement with Monster on some other basis (e.g. financial covenants and/or as a result of cross-default provisions).

If and when Black Pearl has defaulted on its loan agreement and pursuant to the terms of the mortgage, Monster (in its capacity as secured creditor) (assuming that the mortgage over the ships was effected by way of legal mortgage) may consider it appropriate to: (i) take possession and exercise its powers of sale with respect to the cruise ships; or (ii) to appoint a receiver to realise the property.

If Monster elects to enforce its security following default by Black Pearl, it will not require the sanction of the Grand Court or any liquidator (if appointed) to do so, nor will any enforcement action by Monster be stayed in the event that winding up proceedings are commenced (see Section 142 of the Companies Act).

If Monster elects to appoint a receiver, again, this action will not require the involvement of the Grand Court, but rather any such appointment must take effect in accordance with the terms of the relevant security document and the receiver will be able to exercise the powers set out therein, which will typically include a right of sale. The receiver will realise the value of the cruise ships and repay Monster the amount of its unpaid debt.

As noted above, Monster has security for US\$40 million of the debt – the balance of the debt (in the amount of US\$60 million) is therefore unsecured, as well as any balance of the secured debt which is not recovered by Monster upon realisation of its security.

Monster, in its capacity as creditor of Black Pearl, will have standing and may take steps to wind up Black Pearl (see Section 94 of the Companies Act). For these purposes it is assumed that there is no contractually binding non-petition clause – this would be unusual for a debtor / creditor arrangement.

In this regard, it is not clear from the fact pattern above where Black Pearl is incorporated – however, notably it is registered in the Cayman Islands. Pursuant to Section 91 of the Companies Act, Black Pearl may be liable to be wound up in the Cayman Islands: (i) if it is incorporated and registered under the Companies Act; (ii) if it is incorporated elsewhere by registered in the Cayman Islands (which it is); and (iii) if it is a foreign company which carries on business or has property located in the Cayman Islands (which it clearly does as it uses a dry dock facility in Little Cayman). Accordingly, I would expect the Grand Court to have jurisdiction to effect the winding up of Black Pearl – it being registered in the Cayman Islands, and appearing to have certain ongoing operations / assets in the Cayman Islands.

Monster may seek to wind up Black Pearl on the basis that it is unable to pay its debts (see Section 92 of the Companies Act). Black Pearl may be deemed to be unable to pay its debts amongst other things, if Monster (as a creditor to whom Black Pearl owes more than CI\$100) has served a demand on Black Pearl requiring Black Pearl to pay the sum due, in the amount of at least US\$60,000 (being the unsecured portion of the loan plus any amounts which are not satisfied by the enforcement of security / sales proceeds obtained by the receiver) and Black Pearl has failed to make such payment within 21 days of the demand; or alternatively, if Monster is able to prove to the satisfaction of the Grand Court that Black Pearl is unable to pay its debts – this may be evidenced by non-payment of the amounts due and payable pursuant to the loan agreement in accordance with the terms of the loan agreement (see Section 93 of the Companies Act). The normal test for whether a company can pay its debts is calculated on a cash flow basis, although future cash flow may be considered. The onus will be on Monster to prove that Black Pearl is insolvent (i.e. Black Pearl does not need to prove it is solvent).

If Monster is successful in winding up Black Pearl – official liquidators will be appointed, who will be responsible for realising and distributing the assets of Black Pearl to unsecured creditors. Notably – unlike the receiver who will act for the benefit of Monster alone, the official liquidators act for the benefit of all unsecured creditors. Creditors (including Monster) will submit proofs of debt, which will be adjudicated by the official liquidators and admitted (or rejected, as applicable), and will distribute the proceeds following the realisation of Black Pearl's assets *pari passu* in accordance with the statutory order of priorities.

What action can Jolly Roger Inc take against Black Pearl?

According to the fact pattern outlined above, Jolly Roger has the benefit of an arbitral award in the amount of US\$50 million, following arbitration proceedings in London. Jolly Roger may seek leave to enforce such arbitral award – such that the award is recognised as binding and upon application to the Grand Court, shall be enforced.

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") provides for the enforcement of foreign arbitral awards in contracting states. The New York Convention was extended to the Cayman Islands in 1980, by the UK – the Cayman Islands being a British Overseas Territory.

In the Cayman Islands, the enforcement of foreign arbitral awards is governed by the Arbitration Act 2012 (the "**Arbitration Act**") and the Foreign Arbitral Awards Enforcement Act (1997 Revision) (the "**Enforcement Act**") (which gives effect to the New York Convention in the Cayman Islands).

This application is made by way of ex parte originating summons before the Grand Court, together with a supporting affidavit which, amongst other things, shall state that the arbitral award has not been complied with (or the extent to which it has not been complied with) and exhibiting the arbitration award and agreement.

Once leave is granted, the order must be served by Jolly Roger on Black Pearl. Black Pearl will then have 14 days to apply to set aside the order. The arbitral award may not be enforced by Jolly Roger until the expiration of that 14 day period or until the Grand Court has disposed of any application made by Black Pearl within that 14 day period.

In certain circumstances, the enforcement of an arbitral award may be refused by the Grand Court, e.g. if Black Pearl is able to establish that the arbitration agreement was not valid, etc., or if the award is in respect of a matter which is not capable of settlement by arbitration or it would be contrary to public policy to enforce the award.

Assuming that Jolly Roger's application for enforcement is successful, the award of the arbitral tribunal may be enforced in the same manner as a Cayman judgment or order to the same effect and judgment may be entered in terms of the award (see Section 72 of the Arbitration Act).

A number of execution options will then be available to Jolly Roger including: (i) writ of *fiery facias* (the seizure and sale of Black Pearl's goods and chattels sufficient to satisfy the debt and costs of the execution); (ii) garnishee proceedings (where a person indebted to Black Pearl is required to pay moneys owed directly to Jolly Roger); (iii) charging orders (i.e. provision of security over Black Pearl's assets to Jolly Roger); (iv) appointment of receivers; and (v) attachment of earnings orders. Additionally, Jolly Roger (as award creditor) may petition to wind up Black Pearl based on the foreign arbitral award, on the basis that Black Pearl is unable to pay its debts.

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

As noted above, Black Pearl has already failed to pay various service providers for several months (tender vessels, food and beverage suppliers, utilities, engineers and mechanics). Such unsecured trade creditors may file a winding up petition in respect of a debtor company – accordingly, the unsecured creditors may petition for the winding up of the Black Pearl, on the basis of Black Pearl being unable to pay its debts (see Section 92 of the Companies Act).

Black Pearl may be deemed to be unable to pay its debts amongst other things, if a trade creditor (to whom Black Pearl owes more than C\$100) has served a demand on Black Pearl requiring Black Pearl to pay the sum due and Black Pearl has failed to make such payment within 21 days of the demand; or alternatively, if the trade creditor is able to prove to the satisfaction of the Grand Court that Black Pearl is unable to pay its debts – this may be evidenced by non-payment of the amounts due and payable pursuant to the relevant contract(s) (see Section 93 of the Companies Act).

In the event that Black Pearl is wound up, and the official liquidator(s) have realised Black Pearl's assets and have adjudicated proofs of debt submitted by creditors, the official liquidator(s) will make distributions to creditors in accordance with the statutory order of priorities set out in the Companies Act. In this regard, it should be noted that secured creditors will rank in priority (e.g. Monster – up to the amount of the secured debt), following which liquidation expenses and preferential debts are paid. The trade creditors identified in the fact pattern are likely to fall within the scope of preferential debts – which includes unsecured debts which are not subject to subordination agreements.

If Black Pearl is in official liquidation, the trade creditors may assign their claims or trade without seeking the leave of the Court (including if the Black Pearl is in official liquidation), although they will need to give notice to Black Pearl of any assignment.

The 'utilities' identified as being unsecured creditors are not identified in detail. However, notably, if Black Pearl is wound up, the official liquidator(s) may request for the continued provision of electricity, water or telecommunications. The relevant utilities supplier may make it a condition of the provision of such supply that the official liquidator(s) personally guarantees the payment of any charges in respect of that supply – however, it may not require the payment of outstanding charges (which pre-date the appointment of the official liquidator(s)) as a condition of supply (see Section 148 Companies Act).

Does the Cayman Islands Court have jurisdiction over Black Pearl?

Yes, I would expect the Grand Court of the Cayman Islands to have jurisdiction over the Black Pearl.

Pursuant to Section 91 of the Companies Act, Black Pearl may be liable to be wound up in the Cayman Islands (and therefore is subject to the jurisdiction of the Grand Court): (i) if it is incorporated and registered under the Companies Act; (ii) if it is incorporated elsewhere by registered in the Cayman Islands; and (iii) if it is a foreign company which carries on business or has property located in the Cayman Islands, or is registered under Part IX.

In this regard, it is not clear from the fact pattern above where Black Pearl is incorporated – however, notably it is registered in the Cayman Islands. It is not clear if Black Pearl is registered as an 'overseas' company in the Cayman Islands under Part IX.

If the Black Pearl is incorporated in the Cayman Islands and pursuant to Section 91 of the Companies Act, the Grand Court has jurisdiction to make (winding up) orders in respect of companies which are incorporated in the Cayman Islands. Alternatively, if the Black Pearl is not incorporated in the Cayman Islands, I would expect the Grand Court to have jurisdiction either on the basis that it is registered in the Cayman Islands (notwithstanding it is incorporated elsewhere); or on the basis that it has certain ongoing operations / assets in the Cayman Islands (the fact pattern above indicating that it has certain operations in Little Cayman – namely a dry dock at which maintenance is effected over its vessels (at a minimum)).

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

Yes, Black Pearl may seek to effect a scheme of arrangement – this is a court sanctioned compromise or arrangement entered into between a company and its creditors or members (or any class of them) (see Section 86 of the Companies Act). A scheme of arrangement is a highly flexible tool which may be used to effect a restructuring in such terms / manner as may be required in the particular context – it may, for example, be used to restructure liabilities (e.g. Black Pearl's liabilities to its creditors – which it may seek to reduce, extend or amend).

The scheme may be commenced by Black Pearl, or any creditor or shareholder (as applicable). In the current fact pattern, I would expect any scheme to be put forward by Black Pearl itself.

Critically, a scheme of arrangement does not include an automatic moratorium (which is only available if the company is in liquidation, including provisional liquidation). Accordingly, in the event that it is necessary for Black Pearl to have 'breathing space' to effect the restructuring, a petition will need to be presented to the Grand Court for an order appointing provisional liquidator(s) on the grounds that Black Pearl is or is likely to pay its debts as they fall due and Black Pearl intends to present a compromise or arrangement – this is sometimes known as a

'provisional liquidation wrapper'. Critically, if Black Pearl is put into provisional liquidation, then the stay will not operate to prevent the enforcement of any security (including the enforcement of the mortgage by Monster over the 4 cruise ships).

The process governing schemes of arrangement is set out in Order 102, rule 20 of the Grand Court Rules and Practice Direction No. 2 of 2010. A scheme of arrangement is commenced by filing of a scheme petition, following which a three stage process takes place as follows:

- (a) an application is made to the Grand Court for an order that meetings of creditors or members be convened for the purpose of approving the scheme;
- (b) the scheme proposals are discussed at the meetings convened in accordance with the order of the Grand Court and are either approved or rejected; and
- (c) if approved, an application is made to the Grand Court for an order that the scheme be sanctioned (or approved) by the Grand Court.

In order for a scheme of arrangement to be approved, a majority in number representing over 75% in value of the of the creditors (or class of creditors, or members or class of members) present and voting in person or by proxy at the relevant scheme meeting, must agree to the compromise or arrangement. Notably, the relevant statutory majorities are not determined by reference to all the members of that class – but rather those that are present and voting.

This mechanism would allow Black Pearl to affect a 'cram down' of dissenting creditors within an accepting class, provided the threshold is reached. Conversely, creditors with a blocking stake may be able to prevent a scheme from being approved. Notably, there is no inter-class cram-down.

Following on from (e) above and assuming there is a legal route via which Black Pearl 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 yes, the existing management (i.e. the Sparrow family) may continue to manage Black Pearl. If Black Pearl is in provisional liquidation, then it will be necessary to have regard to the Order of the Grand Court – which will determine which powers remain with the directors of Black Pearl and which will be vested in the provisional liquidators. In certain circumstances, directors may be relieved of all control.

In the circumstances, I would expect any provisional liquidation (in the context of a broader scheme) to be by way of 'light touch' provisional liquidation, with the existing directors continuing to take steps to negotiate and effect the scheme of arrangement.

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

If the scheme of arrangement has necessary creditor support (or member support, as applicable), the compromise or arrangement must be sanctioned by the Grand Court before it is binding on all creditors (or class of creditors, members or class of members, as applicable), the company and its contributories.

A dissenting creditors (or member) has the right to attend and be heard at the sanction hearing before the Grand Court.

The Grand Court will be concerned as to whether the convening orders were complied with (e.g. the meeting(s) were convened in accordance with the Grand Court order, and notices appropriately sent, together with all relevant information to those voting), whether the majority voting in favour of the scheme fairly represent the class of creditors (or members), whether

the arrangement (having regard to the alternatives, e.g. Liquidation) is such that an intelligent and honest member of the class convened, acting in his own interest, might reasonably approve it.

*** End of Assessment ***

Commented [BT19]: Total marks for this candidate = 45.5