



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

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- 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.**
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- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 9 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 an application for a restructuring officer is filed:

- (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

Question 1.2

Which of the following is not available to a debtor company in the Cayman Islands?

- (a) Appointment of a receiver.**
- (b) Court-supervised liquidation.**
- (c) Official liquidation.**
- (d) Deed of Company Arrangement.**

Commented [BT2]: Correct

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.

Commented [BT3]: Correct

(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.

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

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

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

Commented [BT6]: Correct

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

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.

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.

Question 1.10

Select the correct answer.

In order for a proposed creditor 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.

QUESTION 2 (direct questions) [10 marks]

Commented [BT8]: Correct

Commented [BT9]: Correct

Commented [BT10]: Correct

Commented [BT11]: 10/10

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?

Yes, it is possible for a creditor to register its security over an asset in the Cayman Islands. Security may be taken over movable and immovable assets. For immovable property, the following forms of security can be granted:

- Legal mortgage: A lender acquires legal title to the property as security for a debt. The debtor remains in possession of the property and legal title will be returned to the debtor once the debt has been discharged. The legal mortgage must be created by deed and validly executed. The lender must also ensure that the register of lands is updated to notify third parties and give them priority over any claims on the property. The security can be either freehold or leasehold.
- Equitable mortgage: The lender obtains the beneficial or equitable interest in the property of the debtor. However, the debtor remains in possession and has the legal interest in the property.
- Fixed Charge: This charge must be in writing and created by deed. The property cannot be sold without the consent of the creditor.

The effect of registering a security interest in these circumstances is that it gives the creditor priority over other creditors who have not registered their security interests. This means that if the debtor defaults on its loan, the creditor with the registered security interest will be first in line to be repaid. The registration of a security interest also has the effect of ensuring that any third party which purchases the asset has notice of the interest of the lender or creditor. This is important because it protects the creditor's interest in the asset in the event that the debtor sells or transfers the asset.

Mortgages and charges on certain assets must be registered in the Cayman Islands. In terms of movable property this can consist of assets that can be touched and moved, for example: plants, equipment, trading stock, ships and aircrafts. For movable property, the following forms of security can be granted:

- A mortgage can be created over ships or aircraft. This type of mortgage must be registered in the relevant vessel or aircraft register. A mortgage can also be taken over shares, this can be created by entering the creditor's name in the company's register of members as a holder of shares and the deposit of the relevant share certificate. An equitable mortgage can also be created by an agreement to create a legal mortgage, but the transfer of shares is not registered. This means that the creditor does not become a registered shareholder.
- Fixed charge: This charge must be in writing and created by deed. The property cannot be sold without the consent of the creditor.
- Floating charge: A creditor takes a floating charge over an asset which changes from day to day, such as inventory. There is no need for consent from the debtor for a secured creditor to deal with charged assets under a floating charge.

- Pledge: This is created by contract and perfected through delivery of possession of the asset to the secured creditor. Delivery can be actual or constructive. The assets must be movable and capable of delivery.
- Lien: This type of security gives the creditor the right to keep possession of the asset until there is payment or satisfaction of the debt. While the creditor is entitled to possession of the asset, they are not entitled to sell the asset in the event of default by the debtor.

It is important to note that there is no central public registry of security interests in the Cayman Islands. Instead, each company must maintain its own register of mortgages and charges at its registered office. This means that creditors must search the register of each company that they have a security interest in order to determine whether their security interest is properly registered. Section 54 of the Companies Act provides that: (1) Every limited company shall keep at its registered office in writing a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge 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 mortgages required by subsection (1) shall be open to inspection by any creditor or member of the company at all reasonable times. This register, however, does not create priority over the assets where there are competing claims.

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. Section 240 of the Companies Act provides that "foreign bankruptcy proceeding" includes proceedings for the purpose of reorganising or rehabilitating an insolvent debtor. The Court is empowered under section 241 upon the application of a foreign representative to make orders ancillary to a foreign bankruptcy proceeding for the purposes of —

- recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
- enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- staying the enforcement of any judgment against a debtor
- 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
- ordering the turnover to a foreign representative of any property belonging to a debtor.

Under the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2008 which were amended in 2018 sets out the procedures that must be followed by a foreign representative in order to be recognised by the Grand Court. These Rules apply to every application made, or notice filed, pursuant to Part XVII of the Companies Act. The Grand Court may exercise its power to assist foreign bankruptcy proceedings in a variety of circumstances, including:

Commented [BT12]: The question is not about whether it is possible to grant security, but rather about registration. The candidates final para does deal with this but demonstrates an incomplete understanding e.g. There do exist certain central registers and registration therein has benefits for the creditor. See Guidance Text 5.3 to firm up comprehension. 1.5 marks.

1. For the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
2. For the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
3. To prevent preferential or fraudulent dispositions of property comprised in the debtor's estate;
4. For the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;
5. The recognition and enforcement of security interests created by the debtor;
6. For the non-enforcement of foreign taxes, fines and penalties; and
7. Comity—the recognition, cooperation and enforcement of judicial determinations and proceedings).

Commented [BT13]: A bit vague - the question specifically called for information about section 242. 2.5 marks.

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 judgments in the Cayman Islands is based on common law and statute. Money and certain non-money foreign judgments are enforceable in the Cayman Islands at common law, whereas only money judgments are enforceable under the Reciprocal Enforcement Law. The Foreign Judgments Reciprocal Enforcement Act 1996 revision provides a statutory regime for the enforcement of foreign judgments where there is substantial reciprocity of treatment in the foreign country to judgments given in the Grand Court in the Cayman Islands. Order 71 of the Grand Court Rules provides the procedures to register the judgment in Court. The Act currently applies only to judgments from the Supreme Courts of stated Australian states and territories and the Australian Federal and High Courts. Under Order 72 of the Cayman Islands Grand Court Rules 1995 (as amended) subsection K "any application to which the Grand Court (Bankruptcy) Rules, 1977 or the Foreign Bankruptcy Proceedings (International Co-Operation) Rules 2008 applies" must be commenced in the Financial Services Division (FSD) of the Grand Court of the Cayman Islands.

The common law allows for the recognition and enforcement of foreign judgments from other jurisdictions. According to common law, a foreign decision may be recognized or upheld if it was rendered by a court with competent jurisdiction and is final and conclusive. The judgment must not be contrary to Cayman Islands public policy, nor be obtained by fraud and not contrary to rules of natural justice. In *Bandone v Sol Properties [2008] CILR 301* the Cayman Court held that

...the ability to enforce directly foreign judgments and orders made in personam is no longer confined in the Cayman Islands to judgments for a debt or definite sum of money.

If a foreign judgment meets these criteria, it can be enforced in the Cayman Islands by commencing a fresh proceeding in Cayman Islands in the form of a summary judgment where the foreign judgment is evidenced as an unsatisfied debt or obligation. When the foreign judgment is recognised the judgment creditor will be able to enforce the foreign judgment in the same way as a Cayman Islands judgment. A six-year limitation period applies for enforcement both at common law and under the Reciprocal Enforcement Law (Section 4).

This begins to run from the date of the judgment or, where there have been appeals, the date of the last judgment delivered in those proceedings. Consequently, the legal framework in the Cayman Islands allows for the recognition and enforcement of foreign judgments.

Commented [BT14]: 3 marks

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 9 marks]

In the absence of a statutory prohibition on insolvent trading, is it possible for court appointed liquidators of an insolvent company, or creditors of such a company, to hold its former directors accountable by either seeking financial damages against those directors and / or by seeking to “claw back” any payments that those directors should not have made? If so, please explain the possible options.

Whilst there is no statutory prohibition on insolvent trading a court appointed liquidator of an insolvent company can hold its former directors personally liable if they act in breach of their fiduciary to act in the best interests of the company. If a liquidator believes that a company has been carrying on its business with the intent to defraud creditors, or for any other fraudulent purpose, they may apply to the court for a declaration. The court may then order any person who has knowingly engaged in fraudulent trading to make a contribution to the company's assets. Harre J sitting in the Grand Court held in *Prospect Properties Limited (In Liquidation) v McNeill and J. M. Bodden II*¹ that

“It is well established that one of the fiduciary duties owed by a director to his company is the duty to act in the best interest of that company. A duty is owed by the directors to the company and to the creditors of the company to ensure that the affairs of the company are properly administered and that its property is not dissipated or exploited for the benefit of the directors themselves to the prejudice of the creditors.”

The Court also stated that ‘if a director is in breach of the fiduciary duties and misapply the funds of their company, he becomes a constructive trustee for the company of the misapplied funds and the company may recover its assets because of such abuse. The Court held that financial damages may be recovered against those directors.’ A liquidator may apply to the court and pursue the claim for breach of fiduciary duty on behalf of the company.

In *Weaving Macro Fixed Income Fund Ltd. (In Liquidation) v Stefan Peterson and another*² in an action for damages commenced by the Official Liquidators of Weaving against its former directors, the Grand Court was satisfied that the company's loss was caused by the Directors' willful neglect or default and gave judgment against the former directors in the sum of US 111 million plus costs. It is noteworthy that the Court stated that in order to recover any loss or damage, the burden rests upon the Liquidators to prove that it was caused by the Directors' 'wilful neglect or default' and that there must be (a) knowing and intentional breach of duty or (b) acting recklessly, not caring whether or not the act or omission is a breach of duty.

Further Section 99 of the Companies Act provides that:

“When a winding up order has been made, any disposition of the company's property and any transfer of shares or alteration in the status of the company's members

¹1990-91 CILR 171

²[2011] CIGC J0826-1

made after the commencement of the winding up is, unless the Court otherwise orders, void."

Thus, a liquidator can apply to the Court for repayment of the funds or return of asset which was disposed after the winding up petition was filed. Conversely, the Court in *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* stated that:

"In every case, those seeking a validation order must be able to satisfy the court that what was proposed would not undermine the avoidance function of s.99, that it would not impede or frustrate the unwinding of transactions after the presentation of the petition but would maintain the status quo. That was so whether the company was solvent or insolvent, and whether or not the proposal was made in the ordinary course of business."

The Court further noted that although it can validate a post-petition grant of security it will only endorse where it can be shown that the directors had the authority to make the disposition, they believed that it was in the best interests of the company, the decision was made honestly, and the reasons for the decision was reasonable.

Additionally pursuant to section 145 of the Companies Act

"145. (1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.

"The Cayman Islands Court of Appeal in *Weaving Macro Fixed Income* agreed with Jones J that the directors had failed to perform their supervisory roles to the requisite standard in respect of their delegation to the fund's service providers¹. However, the Court of Appeal held that the evidence available to the Grand Court was not sufficiently demonstrative to enable the Grand Court to find that the directors had wilfully breached their duties. The Court of Appeal confirmed that the correct test for wilful neglect or default was the English authority laid down in *City Equitable*², that negligence is wilful if a person either: (i) knows he is committing and intends to commit a breach of duty; or (ii) is recklessly careless in that he does not care whether or not his act or omission is a breach of duty. "³

The Privy Council has upheld the decisions of the lower courts that redemption payments made to a Swedish bank by Weaving fund shortly before its collapse were voidable preferences that must be repaid. Further, subsections 2 and 3 of 145 further states:

"(2) A payment made as aforesaid to a related party of the company shall be deemed to have been made with a view to giving such creditor a preference.

(3) For the purposes of this section a creditor shall be treated as a "related party" if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions."

³ The Law of Hedge Funds: A Global Perspective, Chapter 8 Directors' Duties, C The Cayman Islands, The Weaving case

Consequently, the liquidator can apply to the court to set aside a preference made to a related party or to a creditor who has been put in a better position by the said transaction. The Liquidator is further empowered under section 146 of the Companies Act to hold its former directors accountable or claw back any dispositions made at an undervalue. This application must be made within six years of the disposal. Section 146 defines "undervalue" in relation to a disposition of a company's property as -(i) the provision of no consideration for the disposition; or (ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition. Thus, "every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator."⁴

Furthermore Section 147 of the Companies Act specifies that
"147. (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section.

Subsection (2) gives the Court the authority to make an order against a person (s) who contravene subsection 1 above. The liquidator can seek to clawback any fraudulent payments that may have been made. Thus, it is possible for court appointed liquidators of an insolvent 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 despite the absence of a statutory prohibition on insolvent trading.

Commented [BT15]: 9/9

Question 3.2 [maximum 6 marks]

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

In the Cayman Islands, receivers can be appointed even though they are not explicitly mentioned in the statutory provisions dealing specifically with insolvency.

- Order 30 of the Grand Court Rules allows for an application for the appointment of a receiver to be made by summons or motion.
- Order 51 provides that the court, when considering an application for the appointment of a receiver by way of equitable execution, should determine whether it is just or convenient that the appointment should be made.
- Order 102 of the Grand Court Rules allows for an application to be made by petition under Section 243 of the Law, for a receivership order in respect of a segregated portfolio of a segregated portfolio company.
- Order 45 (2) of the Rules states that a judgment or order for the payment of money into Court may be enforced by appointment of a receiver.

In summary, there are mechanisms to appoint a receiver in the Cayman Islands, even though there are no specific statutory provisions governing the appointment of receivers in insolvency cases.

A receivership order can also be made in respect of a segregated portfolio in the Cayman Islands. A segregated portfolio company (SPC) is a type of exempted company that allows for the segregation of assets and liabilities between different portfolios. This means that the

⁴ Section 146 (2) Companies Act

assets and liabilities of one portfolio are not liable for the debts and obligations of another portfolio.

The Court may make a receivership order if the segregated portfolio company is insolvent, and the assets of the portfolio are insufficient to meet the claims of creditors. The receivership order will direct that the business and assets of the portfolio are managed by a receiver for the purposes of orderly closing down the business and distributing the assets to creditors.

A receivership can also be an alternative course of action for certain creditors who hold security over shares or assets of a company. In the case of Scotiabank (CI) Ltd. v Treasure Island Resort (Cayman) Ltd⁵, the plaintiff bank held security for a loan it had made to the defendant company by way of a charge and a debenture over the company's assets, which included a hotel. The debenture specified that the floating charge it created over all the assets of the defendant became fixed in the event of default. The defendant defaulted on the loan agreement and the plaintiff, in the exercise of powers and rights under its security, appointed a receiver under s.72 of the Registered Land Law, who took possession and control of the hotel. The receiver obtained, under s.77 of the Registered Land Law, an order permitting sale of the hotel by way of private treaty (varying his power under s.75 to sell by public auction). Subsequently, he was notified that trade creditors of the company would shortly be presenting a petition for its winding up on the ground that it was unable to pay its debts, and they proposed that the sale of the hotel should be postponed awaiting their petition, which they anticipated would result in the appointment of a liquidator over all the assets of the defendant.

The receiver therefore applied to the Court to clarify his right to dispose of those assets of the company covered by the debenture and charge. Smellie CJ in the Grand Court held and confirmed the receivers right to dispose of assets covered by the debenture and charge. Further, the plaintiff bank had acquired an overriding statutory legal and beneficial interest in the property, to the extent of the value of the loan, secured by the statutory charge which included the power to appoint a receiver. The power to sell the property became vested in the receiver on his appointment.

This case confirms that a receiver can be appointed pursuant to rights in a security document and that Receivers do have a role to play in a Cayman Islands insolvency scenario.

Commented [BT16]: 6/6

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

Vegan Patty Inc (VP) is a company registered in the Cayman Islands. It operates a fleet of party boats cross central America and the Caribbean. It was founded by the wealthy Rackham family over 40 years ago. The family continues to own and manage the business.

Between 2015 and 2019, VP had been rapidly expanding its operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to COVID-19 adversely affected its revenues.

⁵ 2004-05 CILR 423

VP has only managed to stay afloat for the past three years with the assistance of a very large loan from Blue Iguana Treasure Bank (BITB). BITB has lent VP USD 300 million (USD 180 million of which is secured by a mortgage over four of VP's largest party boats). The loan facility has now been exhausted. VP has also fallen behind on the monthly repayments to BITB.

This year, the tourism market picked up again; however, VP 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 rum it needs to keep the tourist customers suitably refreshed.

To make matters worse, VP commissioned Johnson & Boris Ltd (JoBo) to build seven more oversized party boats only a few months before the pandemic struck. VP 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 VP must pay damages of USD 50 million to JoBo within 45 days. VP 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 BITB take to protect its interests?

BTB, which has secured \$180 million of the \$300 million loan with a mortgage on four of VP's largest party boats, must register the mortgage on the ship register in the Cayman Islands. This will give BTB priority over any non-registered creditors. Additionally, BTB can register the remaining \$120 million, which is not secured by the boats, on Vegan Patty's register of mortgages and charges pursuant to section 54 of the Companies Act. Ultimately, BTB can seek to enforce its security over the boats for the secured amount and seek to recover the unsecured part of the debt in any insolvency. BTB can then file a winding up petition in respect of Vegan Patty.

Commented [BT17]: And it may do so outside of the insolvency and without leave. 2.5 marks

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

The Cayman Islands has ratified the New York Convention for the recognition and enforcement of arbitral awards which is an international treaty which allows for the enforcement of arbitral awards in contracting states. The ICC ruling that VP must pay damages of USD 50 million to JoBo within 45 days is such an award. JoBo in accordance with Section 5 of the Foreign Arbitral Awards Enforcement Law (1997 revision) can seek to enforce the award in the Grand Court in the same manner as an award under section 22 of the Arbitration Law (1996 Revision). The award shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Islands. In Order to enforce the award JoBo should produce to the Court — (a) the duly authenticated original award or a duly certified copy of it and (b) the original arbitration agreement or a duly certified copy of it as evidence for any enforcement application which is filed.

Commented [BT18]: Yes, and once recognized it can be enforced via a winding up petition - 2.5

(c) What action can the unpaid employees take against VP?

Debts due to employees are classified as preferred debts and shall be paid in priority as mandated by section 141 of the Companies Act. These employees can apply to the court for a winding up order in respect of Vegan Patty.

Commented [BT19]: Good. 1.5

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

Yes, the Cayman Islands Court has jurisdiction over VP. Section 91 of the Companies Act grants the Cayman Islands Court jurisdiction to make winding up orders in respect of an existing company incorporated and registered under the Act. VP is registered in the Cayman Islands and thus the Court can order the liquidation of the company if it is insolvent or if it is in the best interests of the company's creditors or shareholders. Further, section 11(1) of the Grand Court Law 2015 Revision provides that the Cayman Islands Court shall possess and exercise the like jurisdiction within the Islands which is vested in or capable of being exercised in England by the High Court and the Divisional Courts of that Court. Section 37(1) of the Senior Court's Act 1981 grants the court jurisdiction to grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. This means that the Court in the Cayman Islands can likewise appoint a receiver to take control of a company's assets. In conclusion, the Cayman Islands Court has the jurisdiction to wind up VP and to appoint a receiver over its affairs.

Commented [BT20]: Yes. 1.5

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

Under Section 86(1) of the Companies Act, VP can propose a compromise or arrangement between itself and its creditors, including BITB and Jobo. The Court can order a meeting of creditors to be summoned in such a way as it directs. The meeting will be conducted in accordance with the Companies Act and the rules of the Court. If a majority of creditors in number representing 75% in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement agree to the compromise or arrangement, it will be binding on all creditors if sanctioned by the Court.

Additionally, VP can apply to the Court for the appointment of a restructuring officer if the company is or is likely to become insolvent and intends to present a compromise or arrangement to its creditors. The restructuring officer will be responsible for overseeing the company's restructuring process and ensuring that the interests of all stakeholders are protected.

The specific grounds for applying for the appointment of a restructuring officer are set out in Section 91B of the Companies (Amendment) Act 2021. These grounds are:

- i. The company is or is likely to become unable to pay its debts within the meaning of Section 93.
- ii. The company intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Act, the law of a foreign country or by way of a consensual restructuring.

If the Court is satisfied that the company meets the grounds for the appointment of a restructuring officer, it will appoint a restructuring officer who will be responsible for overseeing the company's restructuring process. Under section 91 (B) (4) a restructuring officer appointed by the Court shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company. VP can also make an ex parte application to the Court for the appointment of a restructuring officer on an interim basis pending the hearing of the petition under section 91B(1). Upon the filing of a petition for the appointment of a restructuring officer a moratorium is automatically triggered and therefore no suit, action or petition can be initiated against VP without the leave of the Court pursuant to section 91G (1) of the Companies (Amendment) Act 2021.

Notwithstanding the presentation of a petition for the appointment of a restructuring officer or the appointment of a restructuring officer by the Court under section 91B or 91C, a creditor who has security over the whole or part of the assets of the company is entitled to enforce the creditor's security without the leave of the Court and without reference to the restructuring officer appointed under section 91B or 91C.

Commented [BT21]: 3

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

The Rackman family can continue to be involved in the management of VP during the restructuring process, as long as they are also directors of the company. The court will decide, when appointing a receiver under section 91 (B) (3)(a), how the restructuring officer's powers and functions will affect and modify the powers and functions of the board of directors. The court may also impose any other conditions on the board of directors that it considers appropriate, in relation to the exercise by the board of directors of its powers and functions.

Accordingly, the Rackman family can stay involved in running VP, but the court will decide how much power they have and what conditions they must follow if a Restructuring Officer is appointed. Also, if there is a scheme of arrangement the Rackman family can continue to manage the company if the company remains out of liquidation¹.

Commented [BT22]: 1

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

The Cayman Islands court in considering whether to approve any proposed restructuring would have to apply the principles highlighted in the case of 'In a matter concerning Sections 15 and 86 of the Companies Act (2021 Revision) and Order 102 of the Grand Court Rules 1995 and Bestway Global Holding Inc.⁶, Doyle J sitting in the Grand Court considered the factors the Court will take into consideration which are generalized below:

- Whether the proposed scheme is a scheme of arrangement within the meaning of section 86 of the Companies;
- Whether the scheme document provided all the material information reasonably required to enable the scheme shareholders to come to an informed view on the merits of the scheme;

⁶ FSD 208 OF 2021 (DDJ)

- Whether the Court meeting was properly held and the statutory majorities were achieved;
- Whether there is no reason to believe that the views of the overwhelming majority of those who voted in favor of the scheme did not fairly represent the views of the scheme shareholders as a whole, that they were not acting *bona fide* or that they were subject to coercion;
- Whether the scheme of arrangement is fair in the sense that an intelligent and honest person acting in respect of his relevant interest might reasonably approve of it. Those voting are the best judges of their own commercial interests and reasonableness of the terms of the scheme of arrangement. Being fully informed an overwhelming majority voted in favor of the scheme at the Court meeting. In commercial matters members and creditors are generally much better judges of their own interest than the courts; and
- Whether there is no good reason for the court to exercise its residual discretion not to sanction the scheme.

Also, In the Matter of Jiangnan Group⁷ the Court also applied the principles highlighted above and sanctioned a scheme presented by the petitioners. The Grand Court of the Cayman Islands appointed restructuring officers in the Matter of Oriente Group Limited⁸ in accordance with section 91B of the Companies Act (2021 Revision), which went into effect on August 31, 2022. The Court held that the jurisdiction to appoint restructuring officers can be exercised when the court is satisfied that the following factors are present:

- i. The statutory preconditions of insolvency or likely to become insolvent are met by credible evidence from the company or some other independent source;
- ii. the statutory precondition of an intention to present a restructuring proposal to creditors or any class thereof is met by credible evidence of a rational proposal with reasonable prospects of success; and
- iii. the proposal has or will potentially attract the support of a majority of creditors as a more favourable commercial alternative to a winding up of the company petitioning for the appointment of restructuring officers^{2.5}.

Commented [BT23]: 2.5

Commented [BT24]: 14.5 marks

* End of Assessment *

Commented [BT25]: TOTAL MARKS 46.5 OUT OF 50

⁷ FSD 60 of 2023 (IKJ).

⁸ FSD 231 of 2022 (IKJ).