

## SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

## **CAYMAN ISLANDS**

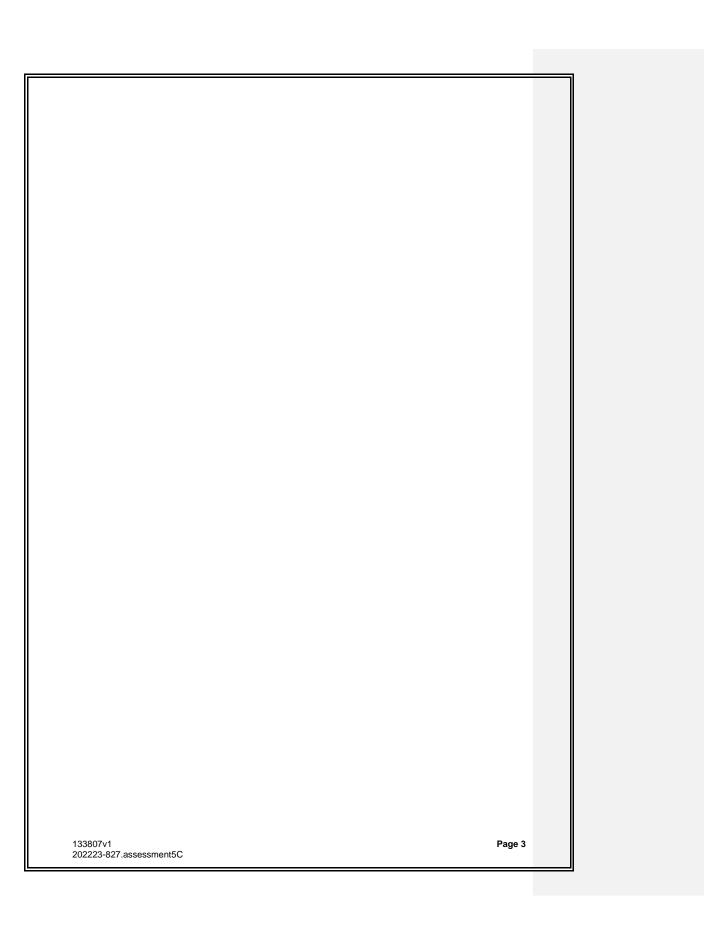
This is the summative (formal) assessment for Module 5C of this course and must be submitted by all candidates who selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 5C. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

#### INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
- 4. You must save this document using the following format: [studentID.assessment5C]. An example would be something along the following lines: 202223-336.assessment5C. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.
- 6. The final submission date for this assessment is 31 July 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.

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.

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#### Question 1.3

Select the correct answer.

In a voluntary liquidation:

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

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.

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.

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.

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.

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% f the creditors must agree.
- (c) More than 50% representing more than 75% of the creditors must agree.

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(d) More than 50% representing 75% or more in value of the creditors must agree.

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QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

[Insofar as public registers are concerned, a creditor may register its security rights (including mortgages and charges) over real estate, ships, aircraft, motor vehicles and intellectual property rights (but not other types of assets) against the ownership registers in the Cayman Islands. The effect of registration is that:- (i) any third party would be deemed to have notice of the security interest (such that, e.g., subsequent purchaser of the charged assets would purchase the same subject to the security interests); and (ii) secured creditor that has completed registration would acquire priority over non-registered creditors.

Insofar as private registers are concerned, security interests in respect of mortgages and charges made by a company should be registered against the register of mortgages and charges of the company, which must be maintained by the company at its registered office in the Cayman Islands according to section 54 of the Companies Act. Such registers would be open for inspection by any member or creditor of the company and thus the effect of registration is that it would give third parties notice of the existence of the security interests as recorded in the register. Nevertheless, non-registration does not affect the validity or priority of the security.]

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?

[Pursuant to section 241(1) of the Companies Act, The Cayman Islands Grand Court does have the power to assist foreign bankruptcy proceedings by (upon the application of foreign representatives) exercising its discretion to grant any of the following forms of ancillary reliefs:-

- To recognize rights of foreign representatives to act in the Cayman Islands on behalf of or in the name of a debtor;
- (ii) To enjoin the commencement or to stay the continuation of legal proceedings against a debtor;
- (iii) To stay the enforcement of any judgment against a debtor;

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- (iv) To require 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 representatives; and
- (v) To order the turnover to foreign representatives of any property belonging to a debtor.

Section 242 of the Companies Act expressly requires that, in determining whether to grant the said ancillary reliefs, the Grand Court shall be guided by "matters which will best assure an economic and expeditious administration of the debtor's estate", which are consistent with:-

- (i) Just treatment of all creditors (wherever they may be domiciled)
- (ii) Protection of creditors in the Cayman Islands against prejudice and inconvenience in processing their claims in the foreign bankruptcy proceeding;
- (iii) Prevention of fraudulent or preferential dispositions of property comprised in the estate of the debtor:
- (iv) Distribution of the estate of the debtor amongst creditors substantially in accordance with the order prescribed by Part V of the Companies Act (i.e. the statutory order of priority);
- (v) Recognition and enforcement of security interests created by the debtor;
- (vi) Non-enforcement of foreign taxes, fines and penalties; and
- (vii) comity.]

## Question 2.3 [maximum 3 marks]

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

[At the outset, it should be noted that the Cayman Islands did <u>not</u> enter into any international treaties in respect of arrangements of reciprocal recognition of judgments. Against such background, there are only two main regimes for the recognition of foreign judgements in the Cayman Islands:-

## (1) Statutory regime

First, the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the "FJREA") has been enacted in the Cayman Islands in respect to the enforcement of foreign judgments. As of today, the FJREA only extends to judgments of the Superior Courts of Australia. The criteria for recognition are that the judgment in question must be:- (i) final; (ii) a monetary judgment; and (iii) made after the FJREA was extended to the country where the judgment is issued (i.e. Australia as of now).

#### (2) Common law

Second, as a matter of common law, the Grand Court may also recognize a foreign judgment where:-

(i) The judgment is final;

133807v1 202223-827.assessment5C

Page 9

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- (ii) The foreign Court has jurisdiction over the judgment debtor;
- (iii) The judgment has not been obtained by fraud;
- (v) The judgment has not been obtained contrary to the public policy of the Cayman Islands:
- (vi) The judgment has not been obtained contrary to rules of natural justice.

The common law recognition regime is based on the procedural regime under the Grand Court Rules. To trigger the regime, the judgment creditor should commence a new action against the judgment debtor based on the foreign judgment in the Cayman Island. Once a local judgment is obtained in the court action, a full range of local enforcement remedies would be available to the judgment creditor.]

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.

[In essence, liquidators appointed by the Cayman Court may hold its former directors accountable via a number of options as set out below:-

#### (i) Breach of fiduciary duty (common law)

Firstly, as a matter of common law, if liquidators find that directors of the company acted in breach of their fiduciary duty (e.g. their duty to act in the best interest of the company before the winding up of the company, the liquidators may commence claims on behalf of the company against such directors accordingly and seek compensation from such directors (in the form of financial damages): see, e.g. Prospect Properties v McNeill [1990-91 CLR 171].

## (ii) Avoidance of (post-petition) disposition of property (section 99 of the Companies

According to section 99 of the Companies Act, upon making of a winding up order, "any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void".

Under this section, liquidators may apply to the Cayman Court for, e.g., a declaration that certain disposition of assets (by the directors of the company or otherwise) after the commencement of the winding up of the company are void and an order for return of such assets for the benefit of the general creditors of the company. The Court is

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133807v1 202223-827.assessment5C

likely to refuse to validate such disposition if it was made when the company was clearly insolvent.

While section 99 above only applies to post-petition dispositions, the following 3 sections apply to pre-petition transactions:-

#### (iii) Voidable preference (section 145 of the Companies Act)

According to section 145 of the Companies Act, upon the application by the liquidators to the Cayman Court, (a) all transfer or charge of property and (b) all payment obligations made or incurred by a company in favour of any of its creditor with a view to giving such creditor(s) preference over the other creditors:- (i) at a time when the company is "unable to pay its debts" (as statutorily defined in section 93 of the Companies Act) and (ii) within six months immediately preceding the commencement of a liquidation shall be voidable.

Under section 145, liquidators may apply to the Cayman Court to "claw back" the prepetition payments made by the directors of the insolvent company to certain creditors of the company in preference to other creditors, i.e. putting the recipient creditors in a better position than it otherwise would have been in the official liquidation.

(iv) Voidable disposition made at undervalue (section 146 of the Companies Act)
Under section 146(2) of the Companies Act, every disposition of property made (i) at an undervalue (ii) by or on behalf of a company (iii) with intent to defraud its creditors shall be voidable at the instance of the liquidators.

The meaning of "undervalue" is statutorily defined in section 146(1) as:- (i) provision of no consideration for the disposition; or (ii) where the value of the consideration for the disposition in money or monies worth is significantly less than the value of the property being the subject of the disposition.

As such, under this section, liquidators are empowered to "claw back" the pre-petition payments that were made by the directors of the insolvent company with a view to defrauding the creditors of the company (subject to certain protection given by section 146(5) to transferees that acted in good faith).

## (v) Fraudulent trading (section 147 of the Companies Act)

Pursuant to section 147 of the Companies Act, 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 Cayman Court may, upon the application by the liquidators, declare that any persons who were knowingly parties to the relevant transactions should be liable to make such contributions to the company's assets as the Court sees fit.

Again, this section empowers liquidators to "claw back" pre-petition transactions which intend to defraud the creditors of the company.]

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#### Question 3.2 [maximum 6 marks]

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

[I disagree with the proposition that "receivers have no role to play in a Cayman Islands insolvency scenario" for reasons to be explained below:-

#### Appointment of receivers as a self-help remedy

At the outset, while there are no general statutory provisions under the law of the Cayman Islands provide for the appointment of receivers <u>by the Court</u> over companies (except for in the case of Segregated Portfolio Companies (see below)), it must be noted that appointment of receivers in general may be done by creditors in accordance with the Grand Court Rules (as well as the terms of the security document in question).

#### **Under the Grand Court Rules:-**

- Order 30 of the Grand Court Rules provides for the appointment and duties of receivers in general;
- (ii) Order 45 of the Grand Court Rules allows the appointment of receivers for the purpose of enforcement of monetary judgments;
- (iii) Order 51 of the Grand Court Rules governs the appointment of receivers by way of equitable execution.

While the aforesaid provisions do not specifically address receivers in insolvency scenario, appointment of receivers as explained above may offer an attractive course of action to creditors (when compared with liquidation). This is because appointment of receivers is a "self-help remedy" that may be done pursuant to the security document per se without involvement of the Court. The receivers may exercise the rights provided to them under the security document to realise the value of the charged assets for the benefit of the creditor(s) who appointed such receiver.

## Receivers in the case of Segregated Portfolio Companies

Relatedly, section 224 of the Companies Act allows the Court to make a receivership order in relation to a segregated portfolio company if the Court is satisfied that:-

- (i) The segregated portfolio assets attributable to a particular segregated portfolio of the company are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio; and
- (ii) that the making of a receivership order would achieve the purposes of:- (a) the "orderly closing down of the business of or attributable to the segregated portfolio"; and (b) the "distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto" (see section 224(3)).

In such case, the role of the receiver to be appointed would be similar to that of a liquidator in insolvency scenario.

For these reasons, I take the view that receivers clearly have a role to play in a Cayman Islands insolvency scenario.]

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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.

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

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- (c) What action can the unpaid employees take against VP?
- (d) Does the Cayman Islands Court have jurisdiction over VP?
- (e) Is there a legal route via which VP can protect itself and seek to restructure?
- (f) Following on from (e) above, can the Rackham family continue play a part in running VP during any restructuring process?
- (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?

#### [(a) What can BITB do?

First, BITB can enforce its security interests in respect of mortgage over four of VP's largest party boats for the secured part of the loan. Relatedly, if the mortgage provides for the possibility of appointment of receivers, BITB may consider appointing receiver accordingly with reference to the Grand Court Rules.

At the same time, BITB can also sue VP for breach of loan agreement. Upon obtaining a monetary judgment, BITB may take steps in the Cayman Islands to enforce the judgment against VB. For instance, BITB may apply for charging orders against the other party boats owned by VP.

Alternatively, BITB can apply to wind up VP based on VP's default on the loan agreement:-

- (i) BITB may first issue a demand requiring VP to repay the loan in full. Should VP fail to satisfy the demand within 21 days, BITB can present a winding-up petition against VP on the basis that VP failed to satisfy the demand.
- (ii) Alternatively, if BITB has already obtained a monetary judgment against VP, BITB can present a winding-up petition against VP based on the monetary judgment.

Upon the winding up of VP and appointment of liquidators, BITB may still enforce its security interests. As regards the unsecured part of the loan, BITB can prove the same in the liquidation of VB, but BITB would be regarded as an unsecured creditor insofar as such unsecured balance is concerned.

## (b) What can JoBo do?

Since the ICC only made its ruling <u>earlier this month</u> that VP must pay damages of USD 50 million to JoBo <u>within 45 days</u>. As such, as of today, the deadline for payment of damages should <u>not</u> have lapsed yet.

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Upon the lapse of the deadline for payment, JoBo can either (a) issue a demand or (b) take steps in the Cayman Islands to enforce the arbitral award against VP pursuant to the Foreign Arbitral Awards Enforcement Act 1975 (1997 Revision). Thereafter, JoBo can apply to wind up VP based on the unsatisfied demand or any court order allowing enforcement of the English arbitral award. Upon the winding up of VP and appointment of liquidators, JoBo can submit proof of debt in the liquidation of VP in respect of the damages payable under the arbitral award.

## (c) What can the unpaid employees do?

Similar to (a) and (b) above, the employees can sue VP for breach of employment contract. Upon obtaining a monetary judgment, the employees may take steps in the Cayman Islands to enforce the judgment against VB.

Alternatively, the employees can apply to wind up VP based on VP's breach of employment contract

- (i) The employees may first issue a demand requiring VP to pay outstanding wages, etc. in full. Should VP fail to satisfy the demand within 21 days, BITB can present a winding-up petition against VP on the basis that VP failed to satisfy the demand.
- (ii) Alternatively, if the employees have already obtained a monetary judgment against VP, the employees can present a winding-up petition against VP based on the monetary judgment.

Upon the winding up of VP, the employees can file proof of debt accordingly. It should be noted that the employees' claim would constitute a "preferential debt" under section 141 of the Companies Act which has a higher priority than, e.g., the general unsecured claims.

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

While it is unclear as to where VP was incorporated, we understand that VP is a company registered in the Cayman Islands. Since the Cayman Islands Court have jurisdiction over, inter alia, companies incorporated elsewhere but subsequently registered in the Cayman Islands (see section 91 of the Companies Act), it is highly likely that the Cayman Islands Court does have jurisdiction over VP.

## (e) Can VP seek to restructure?

Yes, VP may seek to apply to the Cayman Islands Court for appointment of a restructuring officer ("RO") for the purpose of restructuring.

Since 20 August 2022, the new Part V of Companies Act allows a company to present a petition to the Cayman Islands Court for appointing a RO on the grounds that:-(i) the company is or is likely to become unable to pay its debts; and (ii) the company intends to present a compromise or arrangement to its creditors.

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Directors of VP may directly present the said petition to the Cayman Islands Court without first obtaining shareholders' approval by way of resolutions.

Upon the filing of the petition, a moratorium (that has extraterritorial effects) would be automatically triggered, and this may provide time and space for VP to engage in further settlement negotiation with its creditors and develop further restructuring proposals. For instance, the RO may consider the possibility of (a) pursuing informal settlement deals with creditors or (b) entering into a scheme of arrangement.

For completeness, it should be noted that the secured creditors would continue to be entitled to enforce their security without reference to the RO. Thus, in the present case, notwithstanding the appointment of RO, BITB can proceed to enforce its security interests.

For completeness, it is noted that before 20 August 2022, companies in the Cayman Islands generally seek to restructure its debts by applying for appointment of "light touch" provisional liquidator and pursuing schemes of arrangement. Such technique should now be superseded by the use of RO as explained above.

#### (f) Can the Rackham family stay in the management?

Whether or not the Rackham family may continue play a part in running VP during any restructuring process would depend on the terms of the order to be made by the Court in respect of VP's application for appointment of RO.

The Court would decide, on a case by case basis, the powers to be retained by the management of the company after a RO is appointed over the company. in this regard, sections 91B(5)(b)&(c) of the Companies Act provides that:-

"Where the Court makes an order under subsection (3)(a), the Court shall set out in the order -

...

- (b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and
- (c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions."

In the premises, there would not be any definite answer as to whether or not the Rackham family can "continue play a part in running VP during any restructuring process" at this stage.

That being said, as in the case of appointment of "light touch" provisional liquidators in the past, it is expected that the Court would probably allow the management to

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133807v1 202223-827.assessment5C

continue to run VP during the restructuring process subject however to the supervision of the RO.

# (g) What would the Cayman Court consider before approving the proposed restructuring?

Assuming that the proposed restructuring would be done by way of a scheme of arrangement, the Cayman Court would consider the following factors before approving the same:-

- (i) At the first hearing (sometime known as the "convening hearing"), the Court would consider:-
  - (a) Whether the Court has jurisdiction over the company;
  - (b) Whether the scheme document and supporting explanatory statement contain all the information reasonably necessary for creditors to make an informed decision about the proposed scheme;
  - (c) Whether there are any legal issues in respect of the intended class composition.
- (ii) At the second hearing (sometime known as the "sanction hearing"), the Court would consider:-
  - (a) Whether the convening orders have been duly complied with;
  - (b) Whether the scheme meeting(s) have been duly held (e.g. whether notice requirements for the scheme meeting(s) have been duly met);
  - (c) Whether the requisite majority votes have been obtained by the company during the meeting(s) and whether such majority fairly represent the class; and
  - (d) Whether the terms of the scheme are fair, and specifically whether the arrangement is such that an intelligent, honest member of the class of creditors, acting in their own interest, might reasonably approve it.]

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