



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).**
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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.**

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.**

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% 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.**

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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?**

It is possible for a creditor to register its security over an asset in the Cayman Islands. In particular, the Cayman Islands has ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property.<sup>1</sup> Both mortgages and charges can be registered in these centrally maintained ownership registers.<sup>2</sup>

The effect of registry is as follows:<sup>3</sup>

- The secured creditor will now have priority over non-registered creditors; and
- Third party purchasers of the charged asset will now be deemed to have notice of any such interest and will therefore acquire the asset subject to the secured creditor's interest.

Aside from the above, there is no public security registration regime for other type of assets.<sup>4</sup>

However, section 54 of the Companies Act (2022 Revision) does require security interests to be entered in the register of mortgages and charges of a debtor company.<sup>5</sup> Whilst this does not create a priority as above, the register is open for inspection by any member of the company or creditor and therefore puts third parties on notice of the existence of the recorded security.<sup>6</sup> Failure by the company to update its register will also not invalidate any unrecorded security interest.<sup>7</sup>

Commented [BT2]: 3 marks

**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. Its powers to do so are provided for in Part XVII of the Companies Act (2022 Revision) (**Act**).

Whilst there is no threshold test for the grant of assistance, a foreign representative must satisfy the Cayman court that it is appropriate for the court to exercise its discretion by granting the relief sought in the foreign representative's application.<sup>8</sup>

Additionally, the court may grant several forms of ancillary relief as set out in section 240 of the Act:<sup>9</sup>

- (a) Recognise the foreign representative's right to act in the Islands on behalf of or in the name of a debtor;
- (b) Enjoin the commencement or stay the continuation of legal proceedings against the debtor;

<sup>1</sup> Benjamin Tonner QC, *Module 5B Guidance Text – Cayman Islands*, September 2022, p 10.

<sup>2</sup> *Idem*, p 10 – 11.

<sup>3</sup> *Idem*, p 11.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Idem*, p 50.

<sup>9</sup> *Idem*, p 50 – 51.



- (c) Stay the enforcement of any judgment against the debtor;
- (d) Require the examination of a person in possession of information relevant to the business or affairs to the debtor by the foreign representative, as well as order the person to produce documents; and
- (e) Order any property belonging to the debtor to be handed over to a foreign representative.

In determining whether to exercise its power, the court is guided by the following matters as set out in section 242 of the Act, which are aimed to ensure an economic and expeditious administration of the debtor's estate:<sup>10</sup>

- (a) The fair treatment of all holders of claims in accordance with the established principles of natural justice, irrespective where they are domiciled;
- (b) The protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings;
- (c) The prevention of preferential or fraudulent dispositions of property in the debtor's estate;
- (d) The distribution of the estate among creditors in accordance with the statutory order of priority;
- (e) The recognition and enforcement of security interests created by the debtor;
- (f) The non-enforcement of foreign taxes, fines and penalties; and
- (g) Comity, meaning the mutual recognition and co-operation concerning legal decisions.

Commented [BT3]: 4 marks

#### Question 2.3 [maximum 3 marks]

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

The recognition of foreign judgments in the Cayman Islands is possible through two possible avenues.

The first option is recognition under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (**Act**), which provides for a statutory scheme for recognition and enforcement of foreign judgments.<sup>11</sup>

However, the Act only provides for recognition where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Island judgments.<sup>12</sup>

Subject to the above, the Act will only apply to judgments that are:<sup>13</sup>

- (a) Final;
- (b) Money judgments; and
- (c) Made after the Act was extended to the relevant foreign country.

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<sup>10</sup> *Idem*, p 51.

<sup>11</sup> *Idem*, p 53.

<sup>12</sup> *Ibid*, citing section 3(1) of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision).

<sup>13</sup> *Idem*, p 54.

The procedure under the Act is governed by Order 71 of the Grand Court Rules.<sup>14</sup>

In light of the above, recognition of a foreign judgment under the Act has to date only been extended to judgments from the Superior Courts of Australia.<sup>15</sup>

Given the limited application of the Act, the second and more utilised open for recognition of foreign judgments is to commence a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation.<sup>16</sup>

Both money and non-money judgments (including declaratory judgments) are enforceable at common law.<sup>17</sup> The procedural regime as set out in the Grand Court Rules applies.<sup>18</sup>

There are five mandatory requirements for the enforcement of a foreign judgment at common law:<sup>19</sup>

- (a) The judgment must be final;
- (b) The foreign court must have had jurisdiction over the debtor;
- (c) The foreign judgment must not have been obtained by fraud;
- (d) The foreign judgment must not be contrary to the public policy of the Cayman Islands; and
- (e) The foreign judgment must not have been obtained contrary to the rules of natural justice.

Once a foreign judgment is recognised under common law, all domestic enforcement remedies will be available.<sup>20</sup>

Importantly, a six-year limitation period applicable from the date of the judgment or last judgment in the case of appeals, applies to enforcement under both the Act as well as under the common law.<sup>21</sup>

Commented [BT4]: 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.***

Despite the absence of a statutory prohibition on insolvent trading in the Cayman Islands, it is still possible for court appointed liquidators of an insolvent company, or creditors of such company, to hold its former directors accountable by either seeking financial damages

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Idem*, p 55.

against those directors and/or by seeking to claw back any payments that those directors should not have made.

There are several available options.

The first is pursuing directors for breach of common law fiduciary duty. Directors have a common law fiduciary duty to act in the best interests of the company.<sup>22</sup> Breach of that duty can result in personal liability for any losses caused to the company.<sup>23</sup> One examples of the court considering such duty is the case of *Prospect Properties v McNeill* [1990-91 CILR 171], in which the Grand Court held that where a company is insolvent, the directors have a duty to act in the best interest of the company, which requires regard to the interest of its creditors.<sup>24</sup> Furthermore, the Grand Court noted that it is in the interest of creditors to be paid, and in the interest of the company to be safeguarded against being put in a position where it is unable to pay its debts.<sup>25</sup>

In an official liquidation, the official liquidator could pursue such claims against the directors on behalf of the company.<sup>26</sup>

Secondly, section 147 of the Companies Act (2022 Revision) (**Act**) provides a remedy for fraudulent trading. If the business of a company was carried on with intent to defraud creditors, or for any other fraudulent purpose, a liquidator may apply for an order requiring any persons who were knowingly parties to such conduct (including directors of the company in liquidation) to make such contributions to the company's assets as the Court considers appropriate.<sup>27</sup>

Whilst the above options allow for a director to be held personally liable, or to be ordered to make contributions, there are also options to claw back payments or void transactions entered into.

For example, under section 99 of the act, any disposition of property made after the deemed commencement of the winding-up order (this being the date on which the winding-up petition was filed) will be void if a winding-up order is consequently made.<sup>28</sup> If the disposition is held to be void, the liquidator can seek either repayment of the funds, or return of the asset.<sup>29</sup>

However, a court may validate a post-petition grant of security if the company is clearly solvent and if the court is satisfied that an "intelligent and honest" director acting reasonably would come to that decision.<sup>30</sup> If the arrangement is validated, it will not be voided under section 99 of the Act. A court is unlikely to validate such arrangement if the company is insolvent, unless it can be demonstrated that the security grant benefits the company and thereby enhances the value for creditors as a whole.<sup>31</sup>

In addition, section 145 of the Act provides for the avoidance of a payment or disposal of property to a creditor if the payment or disposal amounts to a preference.<sup>32</sup>

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<sup>22</sup> *Idem*, p 40.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Idem*, p 38.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

Such payment or disposal of property will be a preference captured by section 145 if:<sup>33</sup>

- (a) It occurs in the six months before the deemed commencement of the liquidation and at a time when the company is unable to pay its debts; and
- (b) The dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

A creditor has been given a preference over other creditors if the creditor has been put in a better position that he or she would have otherwise been.<sup>34</sup>

Whether or not there was a dominant intention may be inferred from the available evidence.<sup>35</sup> If a disposition is made to a "related party" of the company (this being a person who has the ability to control the company or exercise significant influence), a dominant intention to give a preference will be deemed to be in place per section 145(2) and (3) of the Act.<sup>36</sup>

Importantly, if the dominant intention was to achieve another purpose, the transaction may not be treated as a voidable transaction even if a creditor enjoys a preference as a collateral effect.<sup>37</sup>

If on the application of a liquidator, the transaction is voided, the Grant Court may order the creditor to return the asset and prove for the amount of its claim in the liquidation.<sup>38</sup>

Lastly, section 146 of the Act provides for the avoidance of dispositions at undervalue. In particular, section 146 states that a transaction is voidable on application of the liquidator if the property:<sup>39</sup>

- (a) Is disposed of at an undervalue; and
- (b) With the intention of wilfully defeating an obligation owed to a creditor, this effectively being an intent to defraud.

A disposition is made at undervalue if no consideration, or consideration in money's worth being significantly less than the value of the property, is provided.<sup>40</sup>

An application under section 146 must be brought within six years of the disposal, and the creditor or liquidator bringing the application bears the burden of establishing an intent to defraud.<sup>41</sup>

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### Question 3.2 [maximum 6 marks]

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

<sup>33</sup> *Idem*, p 38-39.

<sup>34</sup> *Idem*, p 39, citing *Weaving Marco Fixed Income Fund Ltd (in Liquidation)* [2019] UKPC 36.

<sup>35</sup> *Idem*, p 39.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

Whilst receivers and receivership are not explicitly mentioned in the statutory provisions dealing with insolvency (these being the Companies Act (2022 Revision) (**Act**) and the Companies Winding up Rules), receivers still have a role to play in a Cayman Islands insolvency scenario.

Firstly, the Grant Court Rules (**GCR**) contemplate that receivers may be appointed by the court for the following purposes:<sup>42</sup>

- (a) Collecting money, such as rents; or
- (b) Carry out some other act, such as execution of a contract or a document of title.

In particular, the following GCR specifically deal with receivers:<sup>43</sup>

- (a) Order 30 GCR governs the appointment and duties of receivers generally;
- (b) Order 45 GCR deals with the enforcement of judgments and orders generally, and states that receivers may be appointed to enforce court orders for the payment of money;
- (c) Order 51 GCR provides for the appointment of receivers by way of equitable execution.

In addition to the GCR, receivers and receivership orders are also specifically provided for by statute in respect of Segregated Portfolio Companies (**SPC**), which are a particular type of Cayman Islands legal entity.<sup>44</sup>

Whilst an SPC is a regular, single entity company, it is permitted to create separate portfolios for the allocation of different type of assets and liabilities, with each portfolio ring-fenced by statute from the assets and liabilities contained in other portfolios.<sup>45</sup>

If the Grand Court is satisfied that the SPC's assets attributable to a portfolio are likely to be insufficient to discharge the claims of creditors relating to that portfolio, the Grand Court may make a receivership order in respect of that portfolio under section 224(1) of the Act.<sup>46</sup>

Such receivership order must direct that the business and assets of, or attributable to a portfolio must be managed by the appointed receiver for the purpose of:<sup>47</sup>

- (a) The orderly closing down of the business of, or attributable to, the segregated portfolio; and
- (b) The distribution of the portfolio assets to those entitled to those assets.

However, a receivership order must not be made if the SPC is in the process of being wound up and ceases to be of effect upon commencement of winding up. Per section 224(4) of the Act, the receivership order ceasing in such circumstances is without prejudice to any prior acts of the receiver or his/her agents.<sup>48</sup>

Once an application has been made for a receivership as well as during its operation, nobody may bring a suit, action or any other proceeding against the SPC without the leave of the court.<sup>49</sup>

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<sup>42</sup> *Idem*, p 41.

<sup>43</sup> *Idem*, p 41 – 42.

<sup>44</sup> *Idem*, p 42.

<sup>45</sup> *Ibid*, citing section 126 of Companies Act (2022 Revision) (**Act**).

<sup>46</sup> *Idem*, p 42.

<sup>47</sup> *Ibid*, citing section 224(3) of the Act.

<sup>48</sup> *Idem*, p 42.

<sup>49</sup> *Idem*, p 42 – 43, citing section 226(5) of the Act.

The receivership role is similar to that of a liquidator,<sup>50</sup> and the receiver ordinarily relieves the directors of their functions and powers relating to the business of the segregated portfolio.<sup>51</sup>

Lastly, receivers also have a role to play in a Cayman Islands insolvency scenario through appointment without court involvement pursuant to the rights of a security instrument.<sup>52</sup>

If appointed this way, the receiver will act in accordance with the powers set out in the charge document.<sup>53</sup> Ordinarily, the receiver will realise the value of the charged asset and use the proceeds to repay the creditor the unpaid debt.<sup>54</sup>

Given this receivership scenario has no court involvement, the receiver is not supervised by the court and instead of owing his duties to the debtor company, will owe them to the creditor.<sup>55</sup>

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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***

<sup>50</sup> *Idem*, p 42.

<sup>51</sup> *Idem*, p 43, citing section 226(6) of the Act.

<sup>52</sup> *Idem*, p 43.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

**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?**
- (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 action can BITB take to protect its interests?

BITB is already in a good position as USD 180 million of its loan is secured by a mortgage. This means that it will be able to take steps to satisfy this portion of the debt given VP is in default by taking possession of the party boats and exercise its power of sale, even if VP is put into liquidation as BITB is a secured creditor with respect to this debt.<sup>56</sup> As a result, any moratorium or stay on actions against VP as a result of a liquidation will not apply with respect to BITB.

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However, in the event there are other secured creditors, BITB could take steps to register its mortgage in the Cayman Islands ownership register for ships. Not only will this give potential third party purchasers of the party boats deemed notice of BITB's interest, it will also give BITB priority over non-registered creditors.

Additionally, and subject to BITB's mortgage instrument including such right, BITB could appoint a receiver to realise the party boats and thereby facilitate repayment of the USD 180 million loan secured by the mortgage. This could be an alternative to BITB enforcing its security on its own outlined above. To the extent realisation of the party boats does not equate to USD 180 million, BITB will be able to prove for the unpaid balance in liquidation, where the balance would be treated as an unsecured debt (further discussed below).

However, the above steps will not assist BITB in protecting the outstanding USD 120 million loan, which is unsecured. BITB could file a petition for the winding up of VP on the basis that VP is registered in the Cayman Islands, BITB is a creditor, and that VP is unable to pay its

<sup>56</sup> *Idem*, p 6 -7.

debts. BITB would have to prove for its debt. Given BITB's debt is unsecured, it would count as a preferential debt under section 141 of the Companies Act (2022 Revision) (**Act**), which would rank equally with the other preferential debts listed in that section. Given preferential debts rank second in the order of priority (after liquidation expenses), this option would be unlikely to result in full repayment of the loan.

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

JoBo's interest, being the outstanding judgment debt of USD 50 million, is an unsecured debt. Given the judgment is a judgment of the ICC sitting in London, and notwithstanding that the Cayman Islands is a British Overseas Territory, the judgment is a foreign judgment and JoBo should take steps to have that judgment recognised in The Cayman Islands in order to protect its interests.

Reliance on the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) is not a viable option here given the provisions of that Act have to date only been extended to judgments of the Superior Courts of Australia.<sup>57</sup>

Instead, JoBo should bring a proceeding for recognition of the foreign judgment under common law. JoBo should be successful in doing so if the five mandatory requirements for enforcement of a foreign judgment are made out:

- 1) The judgment is final – based on the facts provided, this appears satisfied;
- 2) The foreign court had jurisdiction over the debtor – based on the facts provided, it appears the ICC had jurisdiction over VP by virtue of the arbitration clause contained in VP's agreement with JoBo;
- 3) The foreign judgment was not obtained by fraud – there is nothing in the facts to suggest this;
- 4) The foreign judgment is not contrary to the public policy of the Cayman Islands – there is nothing in the facts to suggest this;
- 5) The foreign judgment was not obtained contrary to the rules of natural justice – there is nothing in the facts provided to suggest this.

As such, the ICC judgment ought to be recognised in the Cayman Islands. This means that JoBo would then have the full range of domestic enforcement remedies available to it.

JoBo could then apply to have a receiver appointed by the Grand Court under Grand Court Rules Order 45, under which receivers may be appointed to enforce court orders for the payment of money.<sup>58</sup>

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

Unpaid employees could take steps to put VP into official liquidation.

Given they are unpaid, the employees are creditors who could file a petition for the winding up of VP on the basis that VP is registered in the Cayman Islands and is unable to pay its debts. The benefit of this to the unpaid employees would be that sums due to employees are captured by section 141 of the Act as preferential debts, payable after liquidation expenses.<sup>59</sup> Although the sums due to employees rank equally with the other preferential

**Commented [BT8]:** Nearly. This is about the NY convention and arbitration acts - 1

**Commented [BT9]:** 1.5

<sup>57</sup> *Idem*, p 53-54.

<sup>58</sup> *Idem*, p 41.

<sup>59</sup> *Idem*, p 36-37.



debts set out by section 141 of the Act, this is the best option unpaid employees could take in order to ensure the best chance of repayment by VP.

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

Section 91 of the Act sets out which companies the Grand Court has jurisdiction to make orders over as follows:<sup>60</sup>

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- (a) Incorporated in the Cayman Islands;
- (b) Incorporated elsewhere but subsequently registered in the Cayman Islands; or
- (c) In respect of a foreign company which –
  - (i) Has property located in the Islands;
  - (ii) Is carrying on business in the islands;
  - (iii) Is the general partner of a limited partnership; or
  - (iv) Is registered under Part IX of the Act as an overseas company.

While the facts are silent on VP's place of incorporation, VP is registered in the Cayman Islands. As such, the Cayman Islands Court has jurisdiction over VP.

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

VP could present a petition to the Grand Court for the appointment of a restructuring officer on the grounds that it is unable to pay its debts and that it intends to present a compromise or arrangement to its creditors.<sup>61</sup>

The benefit of this option to VP is that upon filling of the petition, a moratorium with extraterritorial effects is triggered to prevent all suits, actions or any other proceedings against VP without leave to the court.<sup>62</sup> However, such moratorium would not affect BITB with respect to its USD 180 million secured loan as secured creditors will continue to be entitled to enforce their security without leave of the court and without reference to the restructuring officer.<sup>63</sup>

Once the restructuring officer is appointed, VP could attempt to strike an informal deal with all creditors or attempt to introduce a formal scheme of arrangement.

The creditors may agree to such restructuring and the proposed scheme on the basis that it will likely lead to better returns than a classic liquidation.

Once VP files the scheme petition, the three-stage process for schemes must be followed:<sup>64</sup>

- 1) An application must be made to the Grand Court for an order that meetings of creditors or members be convened for the purpose of approving the scheme, this being the convening hearing;
- 2) The scheme proposals are then discussed at meetings held in accordance with the convening order and are either approved or rejected – this being the scheme meetings; and

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<sup>60</sup> *Idem*, p 22.

<sup>61</sup> *Idem*, p 44.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Idem*, p 46.

- 3) If approved at the scheme meeting, an application is made to the Grand Court to obtain approval and sanction of the scheme – this being the sanction hearing.

The overarching benefit of seeking a restructure and a corresponding deal or scheme of arrangement with creditors for VP is that it could avoid an official liquidation and any potential causes of action against VP's directors for voidable property dispositions, voidable preferences, dispositions at undervalue, fraudulent trading or breach of the common law fiduciary duty.

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

Given the role the restructuring officer was only introduced on 30 August 2022,<sup>65</sup> it remains to be seen whether, and to what extent, existing management will continue to have a role in managing the company after a restructuring officer has been appointed.

However, it is anticipated that the Grand Court will determine which powers will remain with the directors (if any) and which will be vested in the restructuring officer in the same way as the Grand Court used to do when appointing provisional liquidators.<sup>66</sup>

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With respect to provisional liquidations, the Grand Court tailors each order to the specific needs of the case and the extent of the powers granted by the court to the provisional liquidator depends upon the reason for the provisional liquidator's appointment.<sup>67</sup>

Given the Rackham family here appears to have largely mismanaged VP, which subsequently resulted in VP's financial demise (notwithstanding that the pandemic has had some unforeseen consequences), it is likely that a court would remove the entirety of the Rackham family's power and vest it in the restructuring officer. Alternatively, the family may remain in control subject to the oversight of the restructuring officer.

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

If the proposed restructuring is by way of a scheme of arrangement, per section 86(2) of the Act, the restructuring will require approval by the court even if the scheme is approved by creditors.<sup>68</sup>

Generally speaking, the Grand Court must be satisfied that the scheme document and supporting explanatory statement contains all the information reasonably necessary to enable the scheme creditors to make an informed decision about the proposed scheme.<sup>69</sup> The court will also take the following factors into account before approving the proposed restructuring:<sup>70</sup>

- (a) Compliance with the convening orders;
- (b) Whether the majority fairly represent the class; and
- (c) Whether the arrangement is such that an intelligent, honest members of the class convened, acting in their own interest, might reasonably approve it.

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<sup>65</sup> *Idem*, p 43.

<sup>66</sup> *Idem*, p 46.

<sup>67</sup> *Idem*, p 27.

<sup>68</sup> *Idem*, p 47.

<sup>69</sup> *Idem*, p 46.

<sup>70</sup> *Idem*, p 48.

Ultimately, the court must be satisfied that the scheme is fair.<sup>71</sup>

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Commented [BT14]: 12.5/15

\* End of Assessment \*

Commented [INS 115]: GRAND TOTAL = 47.5 / 50

Commented [BT16]: TOTAL MARKS 12.5/15

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<sup>71</sup> *Idem*, p 49.