



INSOL
INTERNATIONAL



**INTRODUCTORY CERTIFICATE IN INSOLVENCY LAW AND
PRACTICE IN THE CAYMAN ISLANDS 2023**

Commented [BB1]: TOTAL = 83/100

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

Time limit: 24 hours (from 13:00 Cayman time on 23 November to 13:00 Cayman time on 24 November 2023)

EXAMINERS

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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) Cayman time on Thursday 23 November 2023** and must be returned / submitted by **13:00 (1 pm) Cayman time on Friday 24 November 2023**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the 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. 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). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.SummativeAssessment**. An example would be something along the following lines: 202223-336.SummativeAssessment. **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. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.**
6. Enquiries during the time that the assessment is written must be directed to David Burdette at **david.burdette@insol.org** or by WhatsApp on +44 7545 773890 or to Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).
7. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate’s own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of**

this will forfeit the assessment and disciplinary charges will follow. When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.

8. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
9. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
10. If a candidate is unable to complete this summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on this final assessment will be provided within four weeks of the paper having been written - please do not enquire about your marks before four weeks have elapsed. **However, please note that it is our intention to send out the results on this course by Friday 22 December 2023 at the latest.**
11. Please note that this document will probably reformat in line with the default settings of your printer or PC. Please do not be concerned if the formatting of this document changes in line with your printer or PC settings.

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Questions 1.1 - 1.20 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. Each of the 20 questions count 1 mark.

Question 1.1

What is the date for Financial Institutions to submit its common reporting standard (CRS) Return in respect of reportable accounts?

- (a) 1 January (annually)
- (b) 1 April (annually)
- (c) 1 July (annually)
- (d) 1 October (annually)

Question 1.2

What is the maximum success fee permitted pursuant to Conditional fee agreements?

- (a) 50%
- (b) 33.33%
- (c) 66.66%
- (d) 100%

Question 1.3

Choose the **correct** statement:

How many forms of security interests are recognised in the Cayman Islands?

- (a) 3

Commented [BB2]: Question 1 - Sub-total = 19/20

(b) 5

(c) 6

(d) None of the above

Question 1.4

Who may **not** petition for the winding up of a Company?

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

What is the minimum sum required to be owed, to enable a statutory demand to be used?

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

A Restructuring Officer is required to report to the Court following their appointment:

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

(c) At such intervals as the Restructuring Officer considers appropriate.

- (d) Within 7 days of the appointment.

Question 1.7

Which of the following is **not** required to be included in an affidavit filed in support of a restructuring petition:

- (a) A statement that, having made due enquiry and taken appropriate advice, the board believes that the company is or is likely to become unable to pay its debts.
- (b) An explanation of how the company will be funded during the restructuring period.
- (c) A statement as to why the directors believe that the appointment of a restructuring officer will be in the bests interest of the company.
- (d) A detailed outline of the proposed restructuring plan.

Question 1.8

Choose the **correct** statement:

A petition for the appointment of a Restructuring Officer can be brought by:

- (a) the company.
- (b) any creditor;
- (c) any contributory; or
- (d) all of the above

Question 1.9

Choose the **correct** statement:

Unless the Court otherwise directs, when must the petition for the appointment of a Restructuring Officer be heard?

- (a) within 14 days of the petition being filed.
- (b) within 21 days of the petition being filed.
- (c) within 28 days of the petition being filed.
- (d) within 56 days of the petition being filed.

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

- (a) can be sanctioned by the Court with the consent of all affected parties.
- (b) requires a special resolution in accordance with the company's Articles.
- (c) can only proceed if there are shareholders / creditors who may not agree with it
- (d) Only needs to be approved by a majority in value.

Question 1.11

Select the **incorrect** statement:

- (a) The Cayman Islands adopts the principle of universalism and the principle of assistance in respect of cross-border insolvency.
- (b) Foreign representatives can apply for assistance under Part XVII of the Companies Act.
- (c) The Cayman Islands has implemented the UNCITRAL Model Law on Cross-Border Insolvency.
- (d) There are no automatic rights in the Cayman Islands based on the centre of main interests of the debtor.

Question 1.12

Choose the **correct** statement:

If winding up proceedings are filed against a Cayman Islands company in the Cayman Islands and in a foreign country, which of the following statements is true?

- (a) The Cayman Islands Court will wish to ensure comity between courts in other jurisdictions so it will be deferential to whatever decision is reached by the foreign court.
- (b) The Cayman Islands Court will wish to ensure that Cayman Islands creditors have priority over foreign creditors.
- (c) The Cayman Islands Court will wish to ensure that secured creditors cannot prejudice unsecured creditors.

- (d) The Cayman Islands Court takes into account a number of factors, but the starting point is that the main insolvency proceedings for a Cayman Islands company should take place in the Cayman Islands.

Question 1.13

Select the **correct** statement:

- (a) A voluntary liquidator will automatically cease to hold office if a conflict of interest arises during the liquidation.
- (b) A voluntary liquidator will automatically cease to hold office as such upon the appointment of an official liquidator following a supervision order.
- (c) A sole voluntary liquidator can resign at any time without reference to the shareholders or the court.
- (d) A voluntary liquidator can be removed by the company's creditors.

Question 1.14

Select the **correct** statement relating to the adjudication, quantification and distribution of claims during an official liquidation:

- (a) An official liquidator acts in *quasi*-judicial capacity in respect of the adjudication of claims, meaning that the liquidator's determination will be final and is not capable of dispute.
- (b) A proof of debt is always required in order for an official liquidator to adjudicate on a creditor's claim.
- (c) Only creditors with a contractual right to interest have an entitlement to interest.
- (d) A valid contract (agreed between the company and the creditor) can have the effect of changing the otherwise statutory ranking of that creditors' claim, such that the claim is subordinated.

Commented [BB3]: The correct answer is (d)

Question 1.15

Select the **correct** statement relating to the appointment of inspectors:

- (a) The report of an inspector can be used in any legal proceeding as evidence of the opinion of the inspectors.

- (b) Upon the appointment of an inspector the directors' powers will automatically cease.
- (c) Upon the appointment of an inspector there is a stay of proceedings such that a winding up application cannot be brought.
- (d) Only CIMA has the power to appoint an inspector.

Question 1.16

Select the **correct** statement relating to exempted limited partnerships (ELPs):

- (a) Limited Partners have an unfettered statutory right to petition the court to wind up the relevant ELP / General Partner.
- (b) Where there are inconsistencies in relation to the dissolution of ELPs, the ELP Act will take priority over the Companies Act.
- (c) An ELP is required to have more than one limited partner.
- (d) An ELP formed under the Exempted Limited Partnership has a separate legal personality.

Question 1.17

Select the **correct** statement:

Which of the following statements in relation to informal workouts pursuant to the Cayman Islands law is correct:

- (a) The restructuring officer regime is an example of an Informal workout process under Cayman Islands law.
- (b) A stay of proceedings is not available in the Cayman Islands for informal creditor workouts.
- (c) A qualified insolvency practitioner is required to oversee an informal workout under the Insolvency Practitioners Regulations.
- (d) Under Cayman Islands law, any new financing advanced during an informal creditor workout will be provided with priority status in the event the company is later liquidated.

Question 1.18

Choose the **correct** statement:

Which of the following statements is true regarding a provisional liquidation application?

- (a) The company has the statutory power to commence the proceedings.
- (b) There is a worldwide moratorium (stay) upon the presentation of the provisional liquidation application.
- (c) A winding up petition must be presented as a precursor to the application for the provisional liquidation.
- (d) Following the implementation of restructuring officer regime, a company can no longer seek the appointment of a provisional liquidator if it intends on presenting a restructuring proposal.

Question 1.19

Select the **correct** statement:

An official liquidator can set aside dispositions that seek to prefer one creditor over other creditors within how many months / years before the deemed commencement of the company's liquidation.

- (a) Three months
- (b) Six months
- (c) Six years
- (d) There is no time limit

Question 1.20

Select the **correct** statement:

Which of the following is **not** a fundamental principle of ethics for Insolvency Practitioners per the Cayman Islands Institute of Professional Accountants:

- (a) Conflicts of interest
- (b) Integrity
- (c) Confidentiality
- (d) Professional behaviour

**** END OF QUESTION 1 ****

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

Where appropriate, refer to the fact pattern below when answering the questions that follow. Please note that not all questions relate to the fact pattern.

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

Bluesea Digital Capital Limited (Bluesea) was established in 2018 in the Cayman Islands as a digital asset management platform. Bluesea operated multiple online cryptocurrency trading platforms across the Caribbean and Latin America, known as OTPs. Investments made into these OTPs were held in secure brokerage accounts under Bluesea's own name. Bluesea's clientele comprised a diverse mix of institutional investors, high-net-worth individuals, and consumers.

On 24 June 2022, one of Bluesea's prominent OTPs, eTrade Wave (eTrade), abruptly disabled its buy / sell functionality without prior notice. At the time of suspension, eTrade had amassed over 2,500 users who had collectively invested approximately \$125 million. This sudden suspension of the trading platform created widespread apprehension among investors, resulting in an overwhelming surge of withdrawal requests. Notably, Whitesand Capital (Whitesand) sought to withdraw its entire deposit of \$32 million but faced insurmountable challenges in recovering the funds.

Unable to retrieve its deposit, Whitesand initiated winding up proceedings against Bluesea in May 2023. The petition faced vehement opposition from Bluesea, which asserted that deposits had been transferred to its joint venture partner. Bluesea claimed it needed additional time to resolve a "cordial disagreement" to facilitate the return of deposits. Amid allegations that investor deposits had not been segregated as promised and due to Bluewave's inability to meet its financial obligations, the Grand Court of the Cayman Islands saw fit to make a winding up order on 22 August 2023.

Following the appointment of the official liquidator, Bluesea's joint venture partner, based in Singapore, became the subject of several press reports. These reports alleged that its director had previously been involved in a fraudulent investment scheme in the early 2000s. Furthermore, the official liquidator had discovered that only one audit had ever been conducted in respect of Bluesea's financial statements, with Bluesea's auditors resigning shortly thereafter.

The official liquidators have called for creditor claims, and among the submissions received, a claim amounting to \$0.5 million has surfaced, relating to leasing obligations tied to office space that was utilised by the joint venture partner. Bluesea's documented records fail to substantiate any historical evidence of rental payments being disbursed by the company, nor do they reveal any corresponding liabilities recorded within its financial statements.

Question 2.1 (5/5 marks)

Commented [jo4]: 5 marks

As part of Whitesand's petition to wind up Bluesea, Whitesand obtained sworn consent(s) to act from the proposed official liquidators. Set out the required content of the consent to act signed by the proposed official liquidator(s). **(5)**

The content of the consent to act signed by the proposed official liquidator(s) must state that:

- i) The individual is a qualified insolvency practitioner who meets the residency requirements contained in Regulation 5. In this case, residency means that he is resident in the Cayman Islands, and that the firm that he is a partner or employee holds a trade and business license which authorizes him to carry on business as a professional insolvency practitioner ("IP");
- ii) Having made due enquiry, he believes that he and his firm meet the independence requirement in Regulation 6. Independence in this case means that within a period of 3 years immediately preceding the commencement of the liquidation, he nor his firm acted as auditor in relation to the Bluesea;
- iii) He and/or his firm are in compliance with the insurance requirement contained in Regulation 7. In this case, the insurance requirement mandates that he and his firm have professional indemnity insurance up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in the aggregate, with a deductible of not more than US\$100,000;
- iv) He is willing to act as the official liquidator if so appointed by the Court.

Where the petition for the winding up seeks to appoint a qualified insolvency practitioner to act jointly with a foreign practitioner, the foreign practitioner will need to provide a sworn affidavit stating:

- i) Their professional qualification;
- ii) The country in which they were qualified to perform functions similar to those performed by official liquidators under Cayman Islands law;
- iii) Their professional experience;
- iv) That they will have professional indemnity insurance and meet the requirements of Regulation 7 as noted above;
- v) If they have been appointed as an IP by a foreign court or authority; the details of such appointment;
- vi) That, having made enquiry, that person and their firm meets the independence

requirements per Regulation 6 as noted above.

5 marks

Question 2.2

The proposed liquidators are employees of the accountancy practice Bodden & Ebanks Limited. Shortly prior to the hearing of the winding up petition of Bluesea, it transpires that Bodden & Ebanks Limited previously acted as auditors of Bluesea in 2021. Are the proposed liquidators still able to act in relation to Bluesea? Please provide an explanation for your answer. This information came to light after the proposed liquidators had already provided their consents to act; what should the proposed liquidators do in respect of the same? **(5)**

The proposed liquidators are unable to act as official liquidators, as they have failed to meet the independence requirement pursuant to Regulation 6 of the Companies Winding Up Rules.

Under Regulation 6, a qualified insolvency practitioner shall not be appointed by the Court to act as an official liquidator where he cannot be properly regarded as independent. In this case, independence means that he nor his firm have acted as auditor of the Company within a period of three years immediately preceding the commencement of the liquidation. Having acted as auditor in 2021 and being appointed in August 2023, this requirement is not satisfied.

As the information came to light subsequent to providing their consent to act, the official liquidators can resign pursuant to Order 5, Rule 4 of the Companies Winding Up Rules. To do this, the official liquidators must:

- i) Prepare a report and accounts in accordance with Order 10, Rule 2;
- ii) Give notice of their resignation to the Company's liquidation committee; and
- iii) Apply to the Court for an order that they be released from their performance of duties

The report will need to cover the period since their appointment up to their resignation. If a previous report was already issued, the report will cover the period from the last report up to their resignation.

The accounts to be prepared by the official liquidators will include:

- i) A summary of the estimated realizable value of the Company's assets;
- ii) Any security over those assets;
- iii) The nature and amount of the liabilities, including future and contingent liabilities; The nature and amount of the Company's income;

Commented [jo5]: None of this is relevant to this question, however the candidate has answered the question in full earlier in the text.

Commented [jo6]: 3 marks - read the question carefully, it's not mentioned anyone having been appointed yet as an OL, therefore the text whilst correct about resigning post OL is not relevant to this question. In respect of the consent to acts already signed, the Proposed Liquidators should withdraw and rescind them immediately upon becoming aware of the audit relationship

- iv) The expenses of the liquidation;
- v) The liquidators remuneration approved by the Court;
- vi) What work was done by and on behalf of the liquidators and the amount of remuneration claimed by them;
- vii) The distributions made to creditors and contributories; and
- viii) Any such information which they are required to provide for the creditors and contributories to have a proper understanding of the affairs and financial position of the company.

The application to the Court for the resignation will be served on each member of the liquidation committee; or the liquidation committee's counsel; and any other creditors or contributories as the Court directs.

The liquidation committee will need to nominate a qualified insolvency practitioner as a successor. The successor will need to provide consent to act.

3 marks

Question 2.3

Commented [BB7]: Question 2.3 -Sub-total = 5/5

Tom and Jerry have been appointed as joint voluntary liquidators of Cheese Limited, a Cayman Islands exempted company, upon the passing of a special resolution of the shareholders of Cheese Limited, dated 1 March 2023.

On 1 April, Tom decides to retire from his career as voluntary liquidator and leave his firm, leaving Jerry to act as sole voluntary liquidator.

On 1 June, one of the shareholders reads that Jerry has been named in an Offshore Alert article suggesting that he has been defrauding companies in liquidation. They wish to remove him as liquidator immediately, but do not have the support of the other shareholders to take that action.

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

List the qualifications Tom and Jerry need to act as voluntary liquidators. (1)

There are no qualification requirements for Tom and Jerry to act as voluntary liquidators. Any person can be appointed. (1)

Question 2.3.2 (2/2 marks)

List the statutory steps Tom and Jerry must take within 28 days of their appointment, as set out in the Companies Act. **(2)**

The statutory steps that Tom and Jerry must take within 28 days of their appointment as set out in the Company's Act are that they must:

- i) File notice of the winding up with the Registrar;
- ii) File their Consents to Act with the Registrar;
- iii) File the declaration of solvency provided by the directors with the Registrar;
- iv) If the company was carrying on regulated business, serve notice of the winding up on Cayman Islands Monetary Authority ("CIMA" or the "Authority");
- v) Publish notice of the winding up in the Gazette. **(2)**

Question 2.3.3 (2/2 marks)

Describe the basis upon which the company may resolve to remunerate Tom and Jerry in their capacity as the voluntary liquidators. **(2)**

The remuneration of Tom and Jerry in their capacity as the voluntary liquidators of the Company must be authorized by resolution of the company.

As soon as the affairs of the company are fully wound up, Tom and Jerry must convene a final meeting of the company to consider approving the voluntary liquidator's remuneration, which includes provisions for future work to be done.

Remuneration of the voluntary liquidation may be charged based on hourly rates for time reasonably incurred in the liquidation; a fixed fee; a commission or percentage of assets distributed or realized, or a combination thereof. **(2)**

Where the final general meeting is convened but no member attends and votes either in person or by proxy; the remuneration specified in the final report may be paid.

Question 2.4 (2/2 marks)

Assuming that the contributories petition the Grand Court of the Cayman Islands for an appointment of a provisional liquidator, what are the Court's powers upon the hearing of a winding-up petition? **(2)**

Commented [BB8]: Question 2.4 - Sub-Total = 2/2

Upon hearing a winding-up petition, the Court has the powers to:

- i) Dismiss the petition;
- ii) Adjourn the hearing conditionally or unconditionally;
- iii) Make a provisional order; or
- iv) Any other order that the Court thinks fit.

A winding up order must not be refused by the Court on the grounds only that the company's assets were mortgaged or charged to an amount equal to or in excess of the assets, or that the company has no assets.

Where parties are contractually excluded from the ability to petition the winding up of the other party; the court **may** dismiss the petition on the ground that the party is contractually bound not to present such a petition.

Question 2.5

Question 2.5.1 (3.5/4 marks)

In a brief essay, explain who can apply to the Court to remove official liquidators, and in what circumstances. Who must such an application be served on? (4)

In certain instances, it may be necessary to remove the official liquidator(s) of a company. This is covered under Section 107 of the Companies Act and **Order 5** of the Companies Winding Up Rules.

An official liquidator may be removed from office by order of the Court which is made on an application of a creditor, in the case of an insolvent company; or contributory in the case of a solvent company and on the basis that they are the parties with the ultimate interest in the company's assets upon distribution.

This application for removal is made by way of a summons, supported by an affidavit which sets out the facts relied upon for the removal application. The Removal Summons must also nominate a suitable, qualified insolvency practitioner as a replacement. Every party nominated must swear an affidavit that complies with the requirements for acting as an official liquidator.

The Removal Summons will be served on the official liquidator(s) and each member of the liquidation committee; counsel for the liquidation committee; and any other creditor or contributory as directed by the Court. Fourteen days' notice is required to be given to the official liquidator(s) for the Removal Summons.

Where an official liquidator is ordered removed, he must deliver to the successor official liquidator all the books and records of the company and a copy of the liquidation files; complete records of all the work and steps taken in relation to the liquidation; and must contain:

Commented [ni9]: 'may' is incorrect. Under s.95(2) the court 'shall' dismiss or adjourn the hearing of a WUP. There is no discretion.

Fortunately, this question only requires responses based on s.95(1), which you have provided in full.

Commented [BB10]: Question 2.5 - Sub-total = 6/9

Commented [ni11]: This is not accurate enough. Parts of Order 5 do not cover the removal of OLs. Only O.5, r6.

Only half a mark awarded.

- i) A duplicate of the Court file;
- ii) Any minutes of meetings of creditors and/or contributories;
- iii) Any minutes of the meetings of the liquidation committee;
- iv) The liquidators' reports;
- v) The liquidators' accounts;
- vi) Proof of debt and records relating to their adjudication;
- vii) Any records relating to the collection and realization of assets;
- viii) Any records relating to the liquidation bank accounts;
- ix) The Liquidators' correspondence; and
- x) Notices published by the liquidators.

The liquidators will also prepare a report and accounts within 28 days, for which purpose they will be allowed unrestricted access to the company's books and records.

Question 2.5.2 (2.5/5 marks)

Briefly explain why it makes sense that the class of potential applicant varies in accordance with the solvency of the company. (5)

The class of potential applicants varies in accordance with the solvency of the company. This is because in the case of a Company that is insolvent, the creditors stand in priority for any distributions over contributories. That is, whereby a company is insolvent (ie: unable to pay its debts in full and when they fall due); it is unlikely that the creditors will benefit in full from a distribution of assets and the contributories will have no right to any distribution. As such, any recovery attempts by the liquidators should firstly be in the best interest of the creditors.

In this instance, it makes sense that an application in respect of an insolvent company be made by the creditors.

Where a company is solvent (ie: able to repay all of its debts in full), it is likely that the creditors will be repaid entirely and any surplus to be distributed will then be paid to the contributories. In this instance, the contributories are the main parties affected and as such it makes sense for an application in relation to a solvent company to be made by the contributory.

Question 2.6

During a liquidation there is an expected recovery into the liquidation estate. The amount is such that the liquidation estate is no longer deemed to be insolvent and the official liquidator can settle all of the outstanding creditor claims (including interest) in full. The official liquidator has subsequently filed a revised certificate of solvency (CWR Form No 14)

Commented [ni12]: no reference to BTU Power Company, which is the case cited in this section of the course notes.

Commented [ni13]: not wholly correct. This priority occurs in the case of all companies, not just insolvent ones

Commented [ni14]: This is incorrect - as In Re Herald Fund SPC (In Official Liquidation) - FSD 27/13, Grand Court (unreported), Jones J, 28 January 2014 confirms, solvency for these purposes is a balance sheet test.

Also (whilst not strictly relevant) 'as they fall due' is also not part of our solvency test for winding-up purposes, under s.92(d)).

with the court. What impact will the change in solvency have on the liquidation committee, assuming one has been constituted? (4)

A liquidation committee is established unless the Court orders it otherwise. The body of the liquidation committee act as a sounding board for the liquidator and consults with the liquidator, providing a balance of wishes of the creditors and contributories.

The liquidation committee consists of not less than three and no more than five members, unless there is doubtful solvency, in which case the max members will be six. The nature of the interest of the committee members is contingent on the solvency determination made by the liquidator.

Assuming that a liquidation committee was constituted and that sufficient assets were recovered such that the company is no longer deemed insolvent, the liquidation committee will need to be reconstituted in accordance with Order 9, Rule 3 of the Companies Winding Up Rules ("CWR").

Pursuant to Order 9, Rule 3, where, during the course of the liquidation, the official liquidator changes the official liquidator's certification of the company's solvency or insolvency, the official liquidator shall take the following steps to reconstitute the liquidation committee:

- i) If the Company is certified to be solvent, any creditor members shall automatically cease to be members and the official liquidator shall convene a meeting of contributories for the purpose of electing new members from among the contributories of the company.
- ii) Section 3 of Order 9, Rule 3 does not apply in this instance, however for reference, where the Company is certified to be insolvent, any contributory members of the liquidation committee shall automatically cease to be a member and the official liquidator shall convene a meeting of its creditors to elect new members from amongst the creditors.
- iii) Nothing in this rule shall prevent the official liquidator from convening a meeting in anticipation of changing the liquidator's certificate of solvency.

Question 2.7

Discuss the steps that a liquidator will need to take following the making of an order for dissolution. (5)

Following the making of an order for dissolution, the duties of the liquidator cease, with the exception of any residual duties preserved in the order for dissolution. These residual duties include preservation, storage and destruction of the company's remaining books and records, and dealing with any unclaimed dividends.

With regard to the retention of books and records; the liquidator shall retain the records

Commented [ca15]: Question 2.6 Subtotal
4/4 marks

Commented [ca16]: Question 2.7 Subtotal -
5/5 marks - demonstrates a detailed
understanding

for no longer than a minimum period of 3 years as specified in Order 25, Rule 1.

Similarly, Order 25, Rule 2 governs the retention, storage and destruction of the company's books and records.

In relation to acting as trustee of any unclaimed dividends, the order for dissolution will include details of the remuneration of the official liquidator.

The cost of any post-dissolution storage and destruction of the company's books and records are considered an expense in the liquidation for which provisions will need to be made in the liquidator's final accounts.

The order for dissolution takes effect upon the date the order is made or a later date as specified in the order.

Once the order is issued, the liquidator shall file the order with the Registrar of Companies within 14 days of the date upon which the order is perfected.

Question 2.8

Describe the general investigative powers and duties of a liquidator. (5)

The investigative powers of a liquidator is broad and captured under Section 102 of the Companies Act.

A liquidator is an officer of the court and has a duty to become acquainted with the affairs of the company; to suppress nothing, to conceal nothing, and to ascertain the exact truth in every case before the Court. (1)

The liquidator is empowered to investigate where a company has failed and the reason for its failure; and generally the promotion, business, dealings and affairs of the company; and to make such report to the court as he thinks fit. (1)

This extends to obtaining the books and records of the company; taking control of the company's bank accounts and related statements which may show historic information.

Subject to obtaining directions of the court, the liquidator also has the power to assist CIMA and the Royal Cayman Islands Police Services to investigate the conduct of persons, and institute and conduct a criminal prosecution of an individual.

A liquidator further has the power to request a Statement of affairs be provided by the current or former directors of the company; professional service providers and employees of the company during the period of one year preceding the relevant date, being the date of commencement of the winding up. Professional service provider does not include

Commented [BB17]: Question 2.8 - Sub-total = 4/5

auditors as they are seen to have been independent. (2)

The liquidator can also apply to the court for an order granting them the power to examine any relevant person or require a relevant person to deliver documents belonging to the company. A relevant person may be someone resident in the Cayman Islands or elsewhere and have:

- i) Made or concurred a statement of affairs;
- ii) Is or was a director of the company;
- iii) Is or was a professional service provider;
- iv) Acted as controller; director or liquidator of the company or receiver manager of the company's property;
- v) Not being a person falling within paragraphs i) to iii), is or has been concerned or has taken part in the promotion or management of the company.

To strengthen your good answer, cite the relevant case law:

A liquidator is an officer of the court with certain general duties which were summarised in the Cayman Islands case *In the Matter of Citrico International Limited* [2004-05 CILR 435] (citing *Gooch's Case* 1872, 7 Ch App 207), (1 mark)

Question 2.9

Commented [BB18]: Question 2.9 = 4/5

Explain what is meant by the "relevant date" for the purposes of a section 101 of the Companies Act (2023 Revision) notice served by a liquidator in order to procure a statement of affairs from persons listed in section 101(3). (5)

For the purposes of Section 101 of the Companies Act (2023 Revision) notice served by a liquidator in order to obtain a statement of affairs, the relevant date means the commencement of the winding up. (1) In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)).

This is usually the date of the presentation of the winding up petition; however may also be an earlier date such as:

- i) The date a resolution was passed by the company for voluntary winding up; (1)
- ii) The date fixed for the duration of the company by the articles of association which has expired; (1)
- iii) The date of an event giving rise to the requirement to wind up the company in the articles of association;
- iv) The date a restructuring officer has been appointed. (1)

**** END OF QUESTION 2 ****

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

QUESTION 3 - CORPORATE RESCUE (20 MARKS)

Where appropriate, refer to the fact pattern below when answering the questions that follow.

FACT PATTERN

SMB TECH CORPORATION

SMB Tech Corporation (SMB Tech), a Cayman Islands-based company operating in the technology sector, boasts a global presence with subsidiaries spanning various jurisdictions, including the United States, the United Kingdom, and Hong Kong. However, SMB has recently encountered significant financial challenges stemming from an economic downturn and heightened competition within its industry. Considering these difficulties, SMB sought the advice of a reputable advisory firm, which cautioned that SMB Tech teetered on the brink of insolvency and urgently required a financial restructuring.

While exploring its strategic alternatives, SMB Tech found itself confronting mounting pressure from its creditors. One particularly assertive creditor, Tech Credit Systems (TCS), threatened to initiate winding-up proceedings against SMB Tech. In a bid to secure some respite, SMB Tech entered into a three-month standstill agreement with TCS. However, as the three-month period lapsed without concrete restructuring proposals in place, TCS exhibited signs of growing impatience.

The delay and indecision on the part of SMB Tech's management have further exacerbated tensions among certain contributories of the company. These contributories, expressing their dissatisfaction, have indicated an intent to petition the Grand Court of the Cayman Islands for the appointment of a provisional liquidator. Their chosen provisional liquidator is based in Hong Kong, and their motivation is grounded in a perceived loss of trust and confidence in SMB's directors.

SMB Tech's financial obligations include unsecured debt governed by English law, amounting to GBP 6 million, owed to three creditors situated in the United Kingdom. The company hopes to negotiate a compromise on these liabilities as part of its restructuring efforts. Additionally, SMB Tech has undertaken guarantees for certain financial obligations of several subsidiaries. Notably, the creditors holding these guarantee liabilities have indicated a reluctance to endorse any proposed restructuring scheme.

Question 3.1

The chosen provisional liquidator by the contributories of SMB has professional indemnity insurance up to a limit of US\$5 million in respect of each and every claim. The chosen provisional liquidator is unwilling to increase his professional indemnity liability insurance limit due to the increasing cost of insurance products in the market. Along with your

Commented [BB19]: Question 3.1 - Sub-total = 4/5

reasons, provide an explanation as to whether the chosen provisional liquidator could be appointed by the Grand Court of the Cayman Islands. (5)

As a form of remediation, a provisional liquidator may be appointed which may aid in providing an automatic stay on proceedings. However, there are certain criteria to be met for an insolvency practitioner to be eligible to take the appointment.

A provisional liquidator may be appointed under section 104(2) of the Companies (Amendment) Act (2022 Revision) on application of a creditor or contributory, and in some instances, by CIMA. The petition is made in order to prevent dissipation or misuse of assets; to prevent oppression of minority shareholders; or to prevent mismanagement or misconduct on the part of the director.

To be appointed provisional liquidator, the proposed officeholder must be a qualified insolvency practitioner who meets the residency requirements as contained in Regulation 5. A foreign IP may be appointed as provisional liquidator, however if they do not meet this requirement, they may only act jointly alongside a resident IP, duly qualified to act. (1)

The Joint Foreign IP will need to provide a sworn affidavit stating their professional qualification and country which they were qualified to perform similar functions as that of a Cayman Islands IP.

They will need to provide their professional experience and to state that after making the relevant enquiry, the IP and firm which they represent meets the independence requirements for Independence under Regulation 6. (1)

Notably, assuming that the Hong Kong IP can qualify for the above requirements and act jointly, they must also meet the professional indemnity insurance requirements as stipulated under Regulation 7. (1)

Regulation 7 requires that the IP and/or his firm are in compliance with the insurance requirements, that he and his firm has professional indemnity insurance up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in the aggregate, with a deductible of not more than US\$100,000. (1)

Based on the foregoing, the proposed provisional liquidator will not be able to be appointed solely nor does he meet the insurance requirements.

4 marks

Question 3.2

What must the company demonstrate to the Court before the Court will appoint a restructuring officer? (2)

Commented [jo20]: The proposed HK liquidator wouldn't be able to act at all even jointly without having the proper insurance in place - for that reason and the use of "solely" here 4 out of 5

Commented [BB21]: Question 3.2 - Sub-total = 2/2

To obtain successful Court sanction for the appointment of a restructuring officer, the Company must present a petition pursuant to Section 91(B)(1) of the Companies (Amendment) Act, that a restructuring officer is required on the ground that:

- i) The company is, or is likely to become unable to pay its debts as they fall due; and (1)
- ii) Intends to present a compromise or arrangement with its creditors. (1)

In the recent case considered by the Grand Court in relation to Oriente Group Limited (Unreported, Kawaley J, 9 December 2022), the Court considered:

- i) The solvency test for restructuring purposes - the definition of inability to pay debts was taken to mean the same as that used in winding-up proceedings;
- ii) Similarly, the Grand Court applied that the old statutory scheme or provisional liquidations apply with equal force to the restructuring officer regime as followed in the case of Sun Cheong Holdings [2020 (2) CILR 942].

2 marks

Question 3.3

What are the advertising requirements for a restructuring petition? (2)

The advertising requirements for a restructuring petition are made in accordance with Form Number 3A of the Companies Winding-up Rules ("CWR"). The advertisement must be:

- i) Published once in a newspaper circulating in the Cayman Islands; and (½)
- ii) Published in a newspaper circulating in a country (or countries) in which the petition is most likely to come to the attention of the Company's creditors and contributories. (½)

The advertisement is also required to appear not more than seven business days after the filing of the petition (½) and not less than seven business days before the hearing date. (½) As a result of this, the petition will be heard on notice to stakeholders albeit the statutory framework provides that applications for the appointment of a provisional liquidator is usually held ex parte. That being said, the new regime aims to bring the process in line with best practice.

Question 3.4

Describe at least six (6) elements of the new restructuring officer regime that assist in safeguarding the interests of creditors. (6)

The new restructuring officer regime assists in the safeguarding of creditors' interest.

Firstly, the basis of the regime allows for a petition to be made whereby it is deemed that the company is or will become unable to pay its debts to creditors and intends to present a compromise or arrangement to its creditors. The foundation of this regime deals with

Commented [BB22]: Question 3.3 - Sub-total = 2/2

Commented [BB23]: Question 3.4 - Sub-total = 4/5

providing a better option for creditors.

Under the new regime, the procedure for the restructuring petition is required to be done in Form Number 2A of the CWR and includes information on the Company in relation to the grounds for the petition; the name and address of the nominee; and a statement that the company is either acting by its directors or restructuring officer and intends to present a compromise with its creditors pursuant to the Companies Act, the law of a foreign country, or by way of a consensual restructuring.

The petition must be supported by an affidavit of the board, containing a statement that they've taken appropriate advice and believe that the company will become unable to pay its debts. The affidavit must also include a statement of the company's financial position and the details of its assets and liabilities, including contingent and prospective liabilities and how the company will be funded during this period. (1)

The directors must also provide a statement of why they believe that the restructuring officer and moratorium will be in the best interest of the company and its creditors. Finally, the affidavit will be sworn by the person(s) nominated for the appointment as restructuring officers. (1)

The petition will need to be advertised once in a local newspaper circulated in the Cayman islands and in a newspaper in the country(ies) where it is most likely to come to the attention of the company's creditors and contributories. This notice will also need to be made not more than seven days after the filing of the petition and not less than seven days before the hearing date. (1)

The hearing will be made within 21 days of presentation, and will be heard in open court unless the Grand Court directs otherwise. Upon hearing, the Court may either make the order for appointing the restructuring officer; adjourn the hearing conditionally or unconditionally; dismiss the petition; or make an order that the Court thinks fit, except for the winding-up of the company. (1)

A restructuring officer must be a qualified IP and meet the requirements to act as an IP, including the residency requirement, the independence requirement and the insurance requirement.

4 marks - any of the following additional points

- The default position is that a Restructuring Petition will be heard on notice to stakeholder while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made *ex parte* by default. (1 mark)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint IPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)

- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation – quicker than GL/PL petitions (1 mark)
- A requirement for the ROs to report within 28 days – transparency (1 mark)
- A creditor or contributory may apply for an order discharging the appointment (1 mark)
- Secured creditors remain entitled to enforce their security. (1 mark)

Question 3.5

Outline the relief **that is and is not** available to the Court upon a restructuring petition. (5)

Upon hearing of a restructuring petition, the Grand Court may:

- Make the order appointing the restructuring officer; or
- Adjourn the hearing either conditionally or unconditionally; or
- Dismiss the petition altogether; or
- Make an alternative order that the Court thinks fit, except an order placing the company into official liquidator.

The Court does not have the power to wind up a Company based on a restructuring petition.

Pursuant to Section 91B of the Companies Act, a restructuring officer appointed by the Court shall have powers to carry on a number of functions that the Court may confirm including the power to act on behalf of the company. The Court may also stipulate the manner in which the restructuring officer shall give notice of his appointment to the company's creditors including contingent and prospective, and to the company's contributories.

Where the company is carrying on regulated business, the Court may also set out how notice be delivered to the Authority.

The Court also has the powers to determine the manner and extent to the powers of the restructuring officer will affect and modify the powers of the board of directors. Additionally, the Court may determine any other conditions imposed on the board that the Court considers appropriate.

**** END OF QUESTION 3 ****

Commented [BB24]: Question 3.5 - 5/5

Commented [ca25]: CR on behalf of JR
Question 3.5 Subtotal 5/5 marks

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

The questions below deal with exempted limited partnerships (ELP's), cross-border insolvency, the recognition of foreign judgments and consumer insolvency.

Question 4.1

In addition to the Limited Partnership Agreement, what governs the operation of ELPs? (3)

The operations of ELPs are governed by the Limited Partnership Agreement (the "LPA") (1) agreed between the general partner and the limited partners, the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision) (the "ELP Act").

The ELP Act provides that certain statutory powers are subject to the express provisions in the LPA.

In addition, your answer should have mentioned the principles of common law and equity applicable to partnerships.

Commented [BB26]: Question 4.1 - Sub-total = 2/3

Question 4.2

When does the Cayman Islands court have jurisdiction to wind up a foreign company? (5)

Pursuant to Section 91(d) of the Companies Act, the Cayman Islands Court has jurisdiction to wind up a foreign Company in instances where that Company:

- i) Has property located in the Cayman Islands
- ii) Is carrying on business in the Cayman Islands;
- iii) Is the general partner of an ordinary limited partnership or an Exempted Limited Partner; or
- iv) Is registered under Part IX of the Companies Act - this section of the act requires foreign companies to register in the Cayman Islands where it establishes a place of business, or commences carrying o business within the Cayman Islands.

Commented [sp27]: Question 4.2 - Sub-total = 4/5

Commented [sp28]: Applies to general partners, not to limited partners.

Question 4.3

Does a judgment of a foreign court need to be registered and / or enforced within the Cayman Islands before it is relied upon as the basis for seeking a winding up order? Provide reasons. (3)

As the judgement of a foreign court is not enforceable in the Cayman Islands, certain steps must be taken.

Commented [sp29]: Question 4.3 - Sub-total = 0/3

The Foreign Judgements Reciprocal Enforcement Act (1996 Revision) ("**FJRE Act**") provides that foreign judgements may be registered in the Cayman Islands and enforced within the Cayman Islands in the same manner as a domestic judgement of the Cayman Court. It should be noted however that this statute only extend to certain Courts of Australia and its external territories.

A foreign judgement registered under the FJRE Act can be set aside on application of any party against whom the judgement is enforced and must be set aside if the Supreme Court is satisfied that it is not covered by the FJRE Act; the foreign court had no jurisdiction; the defendant did not receive notice of the proceedings in sufficient time to defend the proceedings; the judgement was obtained fraudulently; or the rights under the judgement are not vested in the person whom the application for registration was made.

Foreign judgements from other jurisdictions that Australia must be enforced under common law by way of commencing a new action in the Cayman Islands. The foreign judgement is then treated as evidence of a debt or another obligation.

In terms of money judgements and non-money judgements, these are enforceable at common law in the Cayman islands, but are subject to further developments. The basic rule is that money judgements will be recognized and enforced as a debt against the judgement debtor where the judgement is conclusive in the foreign court; it was obtained in a court of law which had jurisdiction over the judgement debtor; it was not obtained by fraud; it was not in respect of taxes, fines or penalties; the enforcement would not contravene the public policy of the Cayman Islands and the rules of natural justice were observed in the foreign proceedings.

Once a local judgement is obtained; domestic enforcement remedies become available.

Refer to Kawaley J's first-instance judgment in *In the matter of Guoan International Limited* (unreported, 29 October 2021) which confirms that a creditor may rely upon a foreign judgment as the basis for seeking a winding up order without first obtaining recognition and / or enforcement orders in respect of such foreign judgment from the Cayman Islands Court.

Question 4.4

State the main statutory powers and duties of the trustee in bankruptcy, and provide at least one example with reference to a section of the Bankruptcy Act. **(4)**

The main statutory duty of the trustee in bankruptcy is to **collect and** preserve the property so that it may be returned to the debtor in the event that the provisional order is revoked. **(½)**

The powers are outlined under Part XIV of the Bankruptcy Act (1997) Revision and

include:

- i) To carry on trade of the debtor as necessary or expedient for the beneficial winding up or sale of the business; (½) **section 79**
- ii) Bring or defend legal proceedings related to the property of the debtor; (1) **section 80**
- iii) Receive and adjudicate proof of debts as filed pursuant to the Grabd Court (Bankruptcy) Rules 2021; (1) **section 87**
- iv) **Once an absolute order has been made**, Administer the debtor's estate for the benefit of the creditors. **section 65**

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****