



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 90/100 -
Excellent result!

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

Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers
Ms Cassandra Ronaldson Mr Adam Crane Ms Gemma Lardner Ms Jennifer Fox
Ms Jennifer Colegate Mr Tony Heaver-Wren Mr Paul Smith Mr Spencer Vickers
Mr Benjamin Tonner

MODERATORS

Mr John Royle Mr Nicholas Fox Ms Cassandra Ronaldson
Mr Spencer Vickers Dr David Burdette

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)

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

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

(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.

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

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 requirements for a proposed official liquidator's ("OL's") consent to act are set out in order 3, rule 4 of the Companies Winding Up Rules (2023 Revision) ("CWR") and are as follows:

- 1) That the person is a qualified insolvency practitioner (meaning they meet the test in regulation 4 of the IRPs - they are licensed to act as an insolvency practitioner in a relevant country, are qualified as a professional accountant by an approved institute, has a minimum of 5 years relevant experience and are credited with no less than 2500 chargeable hours of relevant work);
- 2) They meet the residency requirements contained in regulation 5 of the IRPs (being that they are resident in the Cayman Islands and they or their firm hold a trade and business license authorizing them to carry on business as professional insolvency practitioners);
- 3) They have made due enquiries and believe that they and their firm meet the independence requirements in regulation 6 of the IRPs (being that they can properly be regarded as independent as regards the company);
- 4) That they and/or their firm are in compliance with the insurance requirements in regulation 7 of the IRPs (being that they and the firm they are a director or employee at 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\$1 million applicable to negligent performance or non-performance of their duties); and
- 5) They are willing to act as an OL if so appointed by the Court.

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)

Commented [BB3]: Question 2.1 - Sub-total = 5/5

Commented [jo4]: Excellent answer, full 5 marks for this

Commented [BB5]: Question 2.2 - Sub-total = 4/5

Regulation 6 of the IRPs provides that an insolvency practitioner shall not be appointed by the court as an OL unless that person can properly be regarded as independent in relation to the company and that they will not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, that person or the firm or company they are a partner or employee at has acted in relation to the company as its auditor.

Commented [jo6]: 4 marks - good answer

This will also be considered a "significant professional relationship", which is likely to arise when the audit-related work took place within the preceding three years (as it did here) and therefore where the insolvency practitioner is unlikely to reduce the risk of non-compliance with the fundamental principles of the code of ethics/ professional conduct.

Bodden & Ebanks Limited, the company the proposed OLs are employees at has acted as the company's auditor within the last three years and therefore the proposed OLs are not sufficiently independent. The proposed OLs should not take on the appointment, and should immediately withdraw their consents to act. They can do this by filing further affidavits setting out that since swearing the consents to act they have become aware that their firm acted as auditors for the company within the last three years and that they no longer consider they meet the independence requirements and therefore retract their consent to act.

4 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)

Tom and Jerry do not need any qualifications to act as voluntary liquidators. Any person (including a director or officer of the company) can be appointed as its voluntary liquidator. (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)

Section 123 of the Companies Act ("Companies Act") provides that within 28 days of their appointment, Tom and Jerry must:

- 1) File notice of the winding up with the Registrar;
- 2) File their consents to act with the Registrar;
- 3) File the director(s) declaration(s) of solvency with the Registrar (if the director(s) make declaration(s) of solvency);
- 4) Serve notice of the winding up on CIMA (if the company is carrying out a regulated business); and
- 5) Publish notice of the winding up in the Cayman Islands 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)

Per order 13, rule 9 (1) of the Companies Act the basis and amount of Tom and Jerry's remuneration shall be authorised by resolution of the company. The company can resolve to remunerate them on the basis of an hourly rate, fixed sum, commission or percentage of assets distributed or a combination of the aforementioned methods. (2)

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)

Pursuant to section 95 of the Companies Act, upon the hearing of a winding up petition the court can:

- 1) Dismiss the petition;
- 2) Adjourn the hearing conditionally or unconditionally;
- 3) Make a provisional order; or
- 4) Make any other order the court thinks fit,

(except it cannot refuse to make a winding up order only on the ground that the company's assets have been mortgaged or charged to an amount equal to

Commented [BB8]: Question 2.4 - Subtotal = 2/2

or in excess of those assets or that the company has no assets).

Question 2.5

Commented [BB9]: Question 2.5 - Sub-total = 9/9

Question 2.5.1 (4/4 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)

Section 107 of the Companies Act provides that an application for the removal of an OL can be made by a creditor or contributory of the company. This has been supplemented by case law (see for example *BTU Power Company* [2019 (1) CILR Note 7] which says only creditors can apply for the removal of OLs in an insolvent liquidation and only contributories can apply for the removal of OLs in solvent liquidations, they being the parties with the ultimate interest in the respective insolvent or solvent liquidations.

The court has a broad discretion, but case law says OLs will only be removed with good reason(s). Examples of such reason include the OLs being conflicted, the OLs acting improperly, misconduct, the OLs not carrying out proper investigations or the OLs pursuing litigation without support from creditors. The Court will not remove OLs simply because the creditor/contributory would prefer different OLs be in office.

Order 5 rule 6 of the CWRs requires that the creditor or contributory serve their summons on 1) the OL 2) all members of the liquidation committee ("LC") 3) counsel for the LC (if the LC has counsel) and 4) any other creditors or contributories the court directs.

Question 2.5.2 (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)

A solvent liquidation is primarily conducted in the interests of shareholders. In a solvent liquidation creditors will continue to be paid in the ordinary course of business so creditors do not have an interest in the ultimate distribution of the company's assets/ the liquidation and therefore should have limited access to the court.

An insolvent liquidation is primarily conducted in the interest of creditors, as per the statutory waterfall/ order of payment from the liquidation estate, creditors are paid before shareholders. If the company is insolvent, there is not enough money to pay all creditors and therefore no money to pay contributories. Thus, in an insolvent liquidation shareholders have a limited interest in the liquidation and therefore should have limited access to the court.

If the inappropriate group of stakeholders had extensive abilities to access OLs and the court this could increase the cost of the liquidation and waste the court's time.

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

The relevant rules are set out in order 9 of the CWRs. Per CWR order 9 rule 1(3), if the company is solvent only contributories can sit on the liquidation committee (the contributories being the parties with the ultimate interest in the distributions from the company). Conversely, if the company is insolvent, only creditors can sit on the liquidation committee (the contributories being the parties with the ultimate interest in the distributions from the company).

Before the revised certificate of solvency was filed, the LC would have been made up of creditors. In accordance with order 9 rule 3 of the CWR, upon the revised determination of solvency/ the filing of the revised certificate of solvency, the current members of the LC will automatically cease to be members. The LC must be re-constituted to include only contributories (they now being the group with the ultimate interest in the liquidation). If at least three contributories are not willing to sit on the LC, the OL will need to make an application to the court to dispense with the requirement to form a new LC.

Question 2.7

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

After a company is dissolved, liquidators continue to have obligations in relation to the company. These include:

- 1) Filing the order for dissolution with the Companies Registrar within 14 days (see order 22, rule 2);
- 2) Retaining the liquidation file for three years (or longer if the court orders so) (see order 26 rule 2(3));
- 3) Preserving, storing and then destroying the company's books and records in accordance with the dissolution order (see order 22 rule 2 and order 26 rule 3);

Commented [ca10]: Question 2.6 - Subtotal 4/4 Detailed answer.

Commented [ca11]: Question 2.7 - Subtotal - 5/5 marks

- 4) Acting as trustee of any unclaimed dividends or undistributed assets of the company which remain in their possession/control for the benefit of the contributories or creditors to whom the assets are owed for one year. This include establishing an interest bearing bank account to hold any funds, advertising for claims to those funds and any assets and making payment or transferring title to persons who appear to the former liquidator(s) to have been entitled to receive payment or title as unpaid creditors of the company prior to its distribution. The relevant rules are set out in order 23.

- 5) Transferring any assets of the company held after one year of the date of the company's dissolution to the Financial Secretary per order 23 rule 6.

Question 2.8

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

An OL's investigative powers and duties are primarily set out in section 102(1) of the Companies Act and are to investigate i) if the company has failed, the cause of that failure and 2) generally, the promotion, business, dealings and affairs of the company. **(1)**

Per section 101(3) of the Companies Act, a liquidator can require relevant individuals to provide a statement of affairs which will aid in their investigations, and can also apply to the court for an order allowing the examination of any of a relevant person. **(1)**

An OL also has an obligation to collect in the company's books and records (pursuant to CWR order 24 rule 6(1)), and can obtain a court order requiring any person who is in possession of the company's books/records to provide them to the OL (see section 138 of the Companies Act). **(1)**

A more detailed application/linking of the relevant case law to the facts of the question would have strengthened your answer, which could have included the following:

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)** as requiring the liquidator "to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the courts of his investigation, which is material to ascertain the exact truth in every case before the Court". **(1 mark)** Those persons include existing or former directors or officers of the company; (b) professional service providers to the company; and (c) employees of the company, during the period of one year immediately preceding the relevant date. **(2 marks)**

Question 2.9

Commented [BB12]: Question 2.8 - Sub-total = 3/5

Commented [BB13]: Question 2.9 = Sub-total = 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)

Section 101 of the Companies Act provides a definition of “relevant date” at subsection (6). The relevant date means a) if a provisional liquidator is appointed, the date of the person’s appointment or b) in any other case, “the commencement of the winding up”. (1)
In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)).

Section 100 of Companies Act explains what “commencement of the winding up” means. (1) It provides that the winding up commences when either a) a winding up petition is presented b) a resolution is passed for the voluntary winding up of the company c) the period for the duration of the company set in the company’s articles expires d) an event upon which the company’s articles provides the company will be wound up occurs or e) a restructuring officer is appointed and that order has not been discharged. (2)

**** 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

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

The proposed provisional liquidator will first need to fall under the definition of "foreign practitioner" in section 89 of the Companies Act, meaning they will need to be qualified under the laws of another country to perform functions equivalent to that of a Cayman Islands OL. Therefore first hurdle for the proposed provisional liquidator to get over is that they are properly qualified in Hong Kong.

Regulation 8 of the Insolvency Practitioners' Regulations (2023 Revision) ("IPRs") provides that a foreign practitioner who meets the independence and insurance requirements of regulations 6 and 7 can be appointed to act jointly with a qualified insolvency practitioner (being someone who meets all of the requirements in the IPRs). This is also set out in Section 108(1) which provides that a foreign practitioner may be appointed to act jointly with a qualified insolvency practitioner. Thus, before they could be appointed by the court, the proposed provisional liquidator will need to be willing to act jointly with a Cayman Islands liquidator (being a common approach taken in cross-border insolvencies such as this one).

In relation to insurance, regulation 7 of the IPRs provides that a qualified insolvency practitioner shall not be appointed by the court as an OL unless that person and the firm they are a director or employee at 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\$1 million applicable to negligent performance or non-performance of their duties. Thus, unless the proposed provisional liquidator is willing to increase their insurance coverage and act jointly with a Cayman insolvency practitioner the court will not be able to appoint them as an OL.

Commented [jo14]: 5 from 5, a very well structured answer, with all the relevant sections of the Act and IPRs covered off.

Commented [jo15]: 2 marks

Commented [BB16]: Question 3.3 - Sub-Total = 1/2

5 marks

Question 3.2

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

Pursuant to section 91B(1) of the Companies Act, the company must satisfy the court that 1) it is or is likely to become unable to pay its debts and 2) it intends to present a compromise or arrangement to its creditors.

2 marks

Question 3.3

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

Unless the Grand Court orders otherwise, the restructuring petition must be advertised 1) once in a newspaper circulated in the Cayman Islands and (1/2) 2) in a newspaper having

circulation in a country (or countries) where it will most likely come to the attention of the company's creditors and contributories. (½)

To get a further mark you must include the time ie no more than seven business days after the filing of a Restructuring Petition (½) and not less than seven business days before the hearing date (½).

Question 3.4

Commented [jo17]: 5 from 6

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

- 1) Creditors have standing to appear at the hearing of the restructuring petition, to apply to vary or discharge the order appointing the restructuring officer (91E) and to apply to remove/ replace the restructuring officer (91F), so have extensive access to the court.
- 2) Creditors with security can still enforce that security without reference to the court or the restructuring officer(s).
- 3) Restructuring officers are officers of the court (who must meet the requirements in the IPRs) and there is court oversight (for example the restructuring officer must report to the court) which helps to ensure the restructuring is being progressed appropriately and in the interest of the stakeholders.
- 4) A creditor can still present a winding up petition following the presentation of a restructuring petition with leave of the court, which (depending on the progress of the restructuring petition) can be heard at the same time as the restructuring petition, meaning the creditor can argue for an alternative path.
- 5) A stay on claims against the company is imposed upon the filing of the restructuring officer petition (91G). This allows the company breathing room to attempt to restructure, which more often than not results in a better return for creditors when compared to the company being wound up.
- 6) The company is not in provisional liquidation or in official liquidation, and does not need to add those words after its name. This preserves the value of the company, aiding in the restructuring effort which will usually result in a better return for creditors.

5 marks - additional considerations below would have resulted in the full 6 marks for this question.

- The default position is that a Restructuring Petition will be heard on notice to stakeholders 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 JPLs) - 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 OUP petitions (1 mark)
- A requirement for the ROs to report within 28 days - transparency (1 mark)

Question 3.5

Commented [jo18]: Full 5 marks, well done

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

Pursuant to section 91B(3), on hearing a restructuring officer petition, may:

- 1) Make an order appointing a restructuring officer;
- 2) Adjourn the hearing (either conditionally or unconditionally);
- 3) Dismiss the petition; or
- 4) Make any other order it thinks fits

(except an order placing the company into official liquidation (unless a valid winding up petition has been made and in compliance with section 92 and 95).

5 marks

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

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)

- 1) Partnerships Act (2013 Revision);
- 2) Exempted Limited Partnerships Act (2021 Revision); and (1)
- 3) Common law/ equitable principles (unless they are inconsistent with the Exempted Limited Partnerships Act (2021 Revision) (1)

Commented [BB19]: Question 4.1 - Sub-total = 3/3

Question 4.2

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

Section 91(d) of the Companies Act provides that the Cayman Islands court has jurisdiction to wind up a foreign company that:

- 1) Has property located in the Cayman Islands;
- 2) Is carrying on business in the Cayman Islands;
- 3) Is the general partner of an ordinary limited partnership or exempted limited partnership; or
- 4) Is registered under Part IX of the Companies Act.

Commented [sp20]: Question 4.2 - Sub-total = 4/5

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)

No, a judgment of a foreign court does not need to be registered or enforced within the Cayman Islands before it is used as the basis for seeking a winding up order. Per section 92 of the Companies Act, the court may wind up a company where it is "unable to pay its debts". Per section 93 of the Companies Act, a company is deemed unable to pay its debts if 1) it has not satisfied a valid statutory demand within 21 days 2) execution of a judgment is returned unsatisfied (in whole or in part) or 3) it is proved to the satisfaction of the Court that the Company is unable to pay its debts. There is therefore no need for an unsatisfied judgment to be registered or enforced in the Cayman Islands for it to show that a company is unable to pay its debts (similar to other debts, such as unpaid invoices or amounts owing under bonds, which do not need to be issued or registered in the Cayman Islands to underpin a winding up petition).

Commented [sp21]: Question 4.3 - Sub-total = 2/3

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

Commented [BB22]: Question 4.4 - Sub-total = 2/4

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 powers and duties of the trustee in a bankruptcy include:

- 1) Taking possession of and preserve the debtor's property (see section 75 of the Bankruptcy Act);(½)
- 2) Selling the debtor's property (see section 78 of the Bankruptcy Act);
- 3) Receiving and adjudicating proof of debt (see section 87 of the Bankruptcy Act); and (1)
- 4) (Once an absolute order has been made), administering the debtor's estate for the benefit of the creditors (see section 74 of the Bankruptcy Act). Section 65 (½)

Other main statutory powers and duties include:

Until the provisional order is made absolute, it is the duty of the Trustee to preserve the property such that it may be returned to the debtor in the event the provisional order is revoked (section 38 of the Act).

The Trustee may carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business (section 79).

The Trustee may bring or defend any legal proceedings relating to the property of the debtor (section 80).

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****