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

Commented [BB1]: TOTAL = 85/100  
Excellent results!

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)**

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**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.

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## 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.

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

**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)

Order 3 rule 4 (1) of the Cayman Islands Companies Winding Up Rules ("CWR") sets out the required content for the consent to act to be signed by the proposed official liquidators. Pursuant to the CWR, the consent to act should include: (1)

1. A statement that the proposed official liquidator is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5 of the Cayman Islands Insolvency Practitioners' Regulations ("IPRs"). (1)
2. Confirmation that, having made due enquiry, the proposed official liquidator believes that he and his firm meet the independence requirements contained in Regulation 6 of the IPRs. (1)
3. Confirmation that the proposed official liquidator and/or his firm are in compliance with the insurance requirement contained in Regulation 7 of the IPRs. (1)
4. Confirmation that the proposed official liquidator is willing to act as official liquidator if so appointed by the Court. (1)

5 Marks

Commented [jo4]: 5/5 excellent

### 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)

Regulation 6 of the IPRs (1) sets out the independence requirements for qualified insolvency practitioners, being that "*A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, he, or the firm of which his is a partner or employee, or the company of which he is a director or employee, has acted in relation to the company as its auditor.*" (1)

Commencement of the winding up is deemed to the date on which the winding up petition was filed, which was May 2023 in the case of Bluesea. Accordingly, as Bodden & Ebanks Limited acted as auditors of Bluesea in 2021, which is within a period of 3 years immediately preceding the commencement of the liquidation, they do not meet the independence requirements. (1) As Bodden & Ebanks Limited cannot be properly regarded as independent as regards to Bluesea, they shall not be appointed by the Court as official liquidator of Bluesea. (1)

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

The proposed liquidators should inform the petitioner that they can no longer act as liquidators and withdraw their consent to acts. (1) The Court should also be made aware if the consents to act have already been filed with the Court. Other qualified insolvency practitioners should be sought to be put forward as proposed liquidator.

5 marks

### Question 2.3

Commented [BB6]: 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 qualifications required to act as a voluntary liquidator. Pursuant to section 120 of the Cayman Islands Companies Act (the "Companies Act") "Any person, including a director or officer of the company, may be appointed as its voluntary liquidator." (1)

#### Question 2.3.2

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

Pursuant to section 123, within 28 days of their appointment, Tom and Jerry shall:

- (a) file notice of the winding up with the Registrar;
- (b) file the liquidator's consent to act with the Registrar;
- (c) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought);
- (d) in the case of a company carrying on a regulated business, serve notice of the winding up upon the Authority; and
- (e) publish notice of the winding up in the Gazette. (2)

### Question 2.3.3

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

Pursuant to Order 13 rule 9 (2) the company may resolve to remunerate Tom and Jerry in their capacity as voluntary liquidators on the basis of:

- (a) an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation;
- (b) a fixed sum;
- (c) a commission or percentage of the assets distributed or realised; or
- (d) a combination of these 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)

Under section 95 (1) of the Companies Act, upon the hearing of a winding up petition, the Court may:

- (a) dismiss the petition;
- (b) adjourn the hearing conditionally or unconditionally;
- (c) make a provisional order; or
- (d) any other order that it thinks fit.

Under section 95 (3) where a petition is presented by the contributories of the company on a just and equitable basis, the Court has jurisdiction to make the following orders as an alternative to a winding up order:

- (a) an order regulating the conduct of the company's affairs in the future;
- (b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;
- (c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or
- (d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly.

### Question 2.5

#### Question 2.5.1 (3/4 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)

Commented [BB7]: Question 2.4 - Sub-total = 2/2

Commented [BB8]: Question 2.5 - Sub-total = 4/9

Commented [ni9]: no reference to s.107 of the Companies Act, which is the primary legislation governing such applications.

Pursuant to Order 5 rule 6 of the CWR, a creditor (in an insolvent liquidation) or contributory (in a solvent liquidation) can apply to Court for an order that the official liquidator be removed by summons (referred to in the CWR as a "removal summons").

The circumstances in which the Court will remove the official liquidators will be in cases where good reason(s) has been demonstrated to remove the official liquidator i.e. in cases where there is a conflict of interest or there is an advantage to the removal of the official liquidator for a majority of interest parties in the liquidation.

Pursuant to the Order the removal summons shall be serviced upon the following parties:

- (a) the official liquidator; and
- (b) each member of the liquidation committee; or
- (c) counsel for the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and
- (d) such other creditors or contributories as a Court may direct.

**Question 2.5.2 (1/5 marks)**

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

Section 92 of the Companies Act provides the circumstances in which a company may be wound up by the Court, such circumstances include (among others):

- i. the company is unable to pay its debts; and
- ii. the Court is of opinion that it is just and equitable that the company should be wound up.

A winding up petition brought on the grounds of i. is typically made by a creditor of the company who must prove that the company is insolvent. A shareholder would not apply to bring a winding up petition on the basis that the company is unable to pay its debts, as if the company is insolvent, the shareholder would no longer have any economic interest in the company unless there was a change in the company's solvency status.

A winding up petition brought on the grounds of ii. Is typically made by a shareholder of the company, where the shareholder will need to demonstrate to the Court that it has an economic interest in the company to have the necessary standing. As noted above, where a company is insolvent the shareholder no longer has any economic interest. Therefore, the company would need to be solvent, able to pay its debts and expenses as they fall due, for a shareholder to bring a petition on a just and equitable basis.

**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 [ni10]:** this question follows on from 2.5.1 and asks about the class of potential applicant for an application to remove liquidators.

Therefore this answer does not answer the question posed. However, I have awarded 1 mark because the answer does address a similar topic, namely why creditors may bring WUPs alleging insolvency. So there is some evidence of familiarity with similar underlying concepts.



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

In the case of an insolvent liquidation estate, the liquidation committee shall comprise of not less than three nor more than five creditors in accordance with Order 9 rule 1 (3) of the CWR.

Where there is a change in the official liquidator's certification of the company's insolvency status during the course of the liquidation, the official liquidator has to take steps to reconstitute the liquidation committee pursuant to CWR Order 9 rule 3.

Upon filing of a revised certificate of solvency, the creditor members of the liquidation committee will cease to be members and the official liquidator will have to convene a meeting for the purpose of electing new members of the liquidation committee members from the company's contributories. The liquidation committee of a solvent liquidation estate shall comprise not less than three nor more than five contributories.

As the company had been deemed to be insolvent, the official liquidator had not been required to settle a list of contributories. Pursuant to Order 12 rule 1 (3) the official liquidator should settle the list of contributories when they are satisfied that the company is solvent.

### Question 2.7

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

Order 22 of the CWR provides the steps that an official liquidator should take upon the making of an order for dissolution.

The official liquidator should file the order for dissolution with the Registrar of Companies within 14 days from the date upon which the order is perfected.

The official liquidator's duties cease upon the making of the order for dissolution, however there will be supplementary directions included in the order for dissolution that the liquidator will need to abide by. Order 22 rule 2 (4) sets out the same, which include:

- (a) the retention of the whole or part of the liquidation files for longer than the minimum period of 3 years specified in Order 25, rule 1;
- (b) the retention, storage and destruction of the company's books and records pursuant to Order 25, rule 2;
- (c) the terms upon which the official liquidator will be remunerated for acting as trustee of any unclaimed dividends or undistributed assets under section 153; and
- (d) such other consequential matters as the Court thinks fit.

### Question 2.8

Commented [ca11]: Question 2.6 - Subtotal = 4/4 an insight response

Commented [ca12]: Question 2.7 - Sub-total = 5/5

Commented [BB13]: Question 2.8 - Sub-total = 4/5

Describe the general investigative powers and duties of a liquidator.

(5)

Section 102 (1) of the Companies Act empowers the liquidator to investigate:

- (a) *if the company has failed, the causes of the failure; and*
- (b) *generally, the promotion, business, dealings and affairs of the company.*(1)

Section 110 (1) of the Companies Act sets out the functions of an official liquidator, which include:

- (a) *to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and*
- (b) *to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.*

Schedule 3 of the Companies Act provides powers that an official liquidator can exercise:

1. Powers that can exercised with sanction of the Court (Part I of Schedule 3), for example the power to bring or defend any action or other legal proceeding in the name and on behalf of the company; and
2. Powers that do not require sanction of the Court (Part II of Schedule 3), for example the power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as that person considers necessary.

Pursuant to section 101 of the Companies Act, the liquidator can request directors or officers of the company, professional service providers to the company and employees of the company (in the period one year immediately preceding the relevant date) to submit a statement of affairs of the company. (2) The directors, officers and professional service providers requested to submit a statement of affairs can both current and former. The statement of affairs must be accompanied by an affidavit no later than 21 days following notice of the request. Section 101 (2) and Order 6 of the CWR sets out the form and content of a statement of affairs which include:

- (a) particulars of the company's assets and liabilities, including contingent and prospective liabilities;
- (b) the names and addresses of any persons having possession of the company's assets;
- (c) the assets of the company held by those persons;
- (d) the names and addresses of the company's creditors;
- (e) the securities held by those creditors;
- (f) the dates when the securities were respectively given; and
- (g) such further or other information that the liquidator may require.

Pursuant to section 103 of the Companies Act, the liquidator can apply to the court for an order for (a) the examination of any relevant person; or (b) that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company. Section 103 (1) sets out who is considered a relevant person under the Companies Act

and Section 103 (5) sets out the manner in which the court may order the relevant person to be examined. (1)

In the case of a provisional liquidator, the powers of the provisional liquidator are restricted to the powers that are contained in the court order made appointing the provisional liquidator.

To strengthen your answer, you must cite case law in an application-type question. Your answer contained information that was not asked for (ie the information that must be contained in the statement of affairs). See suggested model answer below:

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)

#### Question 2.9

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)

Under section 101(6) of the Companies Act, the "relevant date" is: This section is

- (a) in a case where a provisional liquidator is appointed, the date of that person's appointment; and
- (b) in any other case, the commencement of the winding up.

Section 100 (1) of the Companies Act sets out when the winding up of a company has been deemed to commence in certain instances before the presentation of a petition for the winding up of a company by the Court, **In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)).** including: (1)

- (a) a resolution has been passed by the company for voluntary winding up; (1)
- (b) the period, if any, fixed for the duration of the company by the articles of association has expired; (1)
- (c) the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred; or
- (d) a restructuring officer has been appointed pursuant to section 91B or 91C and the order appointing the restructuring officer has not been discharged.

In any other circumstance, the winding up is deemed to commence at the time of the presentation of the petition for winding up. (1)

Section 101 (3) lists the persons that a liquidator can serve notice on to procure a

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statement of affairs and includes:

- (a) persons who are or have been directors or officers of the company;
- (b) persons who are or have been professional service providers to the company; and
- (c) persons who are or have been employees of the company, during the period of one year immediately preceding the relevant date.

In the cases of category (a) and (b) the “relevant date” does not impact who the liquidator can serve notice on, however in the case of category (c), the “relevant date” is relevant. For example if the winding up has been deemed to commence on 31 October 2023, the liquidator could serve notice on employees that are currently employed by the company as well as those who may no longer be employees but were employed by the company in the year immediately preceding 31 October 2023. However, if an individual had been employed by the company in August 2022, the liquidator could not serve notice to request a statement of affairs from the individual under the Companies Act.

**\*\* 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

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

Regulation 7 of the IPRs sets out the insurance requirements for qualified insolvency practitioners, being that the qualified insolvency practitioner and his firm of which he is a partner or employee or the company of which he is an employee has professional indemnity insurance. The professional indemnity insurance should cover 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). (1)

An application for the appointment of provisional liquidators must include an affidavit providing the proposed provisional liquidator's "consent to act". The affidavit must include confirmation that the proposed provisional liquidator and / or his firm are in compliance with the insurance requirement under Regulation 7 of the IPRs.

In the case of SMB, as the chosen provisional liquidator's professional indemnity liability insurance only has a limit of up to US\$5 million in respect of each and every claim and there are at least three creditors, they do not meet the insurance requirements under the IPRs. The proposed qualified insolvency practitioner shall not be appointed by the Court. (1)

2 marks

The candidate has failed to pick up from the fact pattern re SMB that the "proposed chosen provisional liquidator" is a foreign practitioner based in Hong Kong. There should have been cross reference to s108 (1) of the Companies Act and then linking IPR 7 to this example by cross referencing IPR regulation 8.

In addition, the reference to "three creditors" has nothing to do with the answer, where IPR 7 talks about "claims" it's referencing insurance claims, nothing to do with creditor claims.

### Question 3.2

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

Section 91 B(1) of the Companies Act sets out the grounds under which a company may present a petition to the Court for the appointment of a restructuring officer, being:

- (a) it is or is likely to become unable to pay its debts within the meaning of section 93; and (1)
- (b) it intends to present a compromise or arrangement to its creditors (or classes thereof), either pursuant to the Companies Act, the law of a foreign country or by way of a consensual restructuring. (1)

In the matter of Aubit International, Justice Doyle in his judgment highlighted that, among

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other aspects, the intention to present a compromise or arrangement should be realistic and genuine as the Court will need to be persuaded that there is a rational and credible restructuring plan.

2 marks

### Question 3.3

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

Under Order 1A rule 1 (3) of the CWR, unless otherwise directed by the Court, a petition for the appointment of a restructuring officer should be advertised once in a newspaper:

- (a) having a circulation in the Cayman Islands. Such advertisement should be published in accordance with CWR Form No. 3A; and (½)
- (b) where the company is carrying on business outside of the Cayman Islands, having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors and contributories. (½)

The advertisements should be made not more than 7 business days after the filing of the petition (½) for the appointment of a restructuring officer and not less than 7 business days before the hearing date. (½)

### Question 3.4

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

Six elements of the new restructuring officer regime that assist in safeguarding the interests of creditors are as follows:

1. The petition by a company to appoint restructuring officers must be advertised in accordance with the requirements under Order 1A (1) of the CWR and creditors have the ability to appear and be heard (when the applicable notice of intention to do so has been adhered to) at the hearing of the restructuring officer petition. (1)  
In the notice of intention (CWR Form 4A), the creditor has to specify if they intend to oppose or support the appointment of the restructuring officer and those proposed to be appointed restructuring officer by the company. The creditor can nominate an alternative restructuring officer where they oppose those that have been nominated.
2. While there is an automatic moratorium upon the filing of the application to appoint restructuring officers, under section 91H of the Companies Act creditors who have security over the whole or part of the assets of the company will remain entitled to enforce the creditor's security without the leave of the Court and without reference to the appointed restructuring officer. (1)
3. In addition, with the leave of the Court, creditors can present a winding up petition for the winding up of the company, despite the automatic moratorium upon presentation of an application to appoint a restructuring officer.

Commented [BB17]: Question 3.3 - Sub-total = 2/2

Commented [BB18]: Question 3.4 - Sub-total = 4/5

4. Following the appointment of a restructuring officer, section 91E of the Companies Act provides creditors of the company with the ability to apply to the Court, by way of summons, for the variation or discharge of the order appointing the restructuring officer **(1)**. Upon hearing such an application, the Court can:
  - (a) vary the order appointing the restructuring officer;
  - (b) discharge or continue the order appointing the restructuring officer;
  - (c) adjourn the hearing conditionally or unconditionally;
  - (d) dismiss the application; or
  - (e) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.
5. Section 91F of the Companies Act provides a creditor of the company with the ability to apply to the Court, by way of summons, for the removal and replacement of a restructuring officer. If removed the restructuring officer must prepare a report and accounts for the replacement restructuring officer in accordance with the Companies Act. **(1)**
6. As noted above, there is an automatic moratorium in place upon the filing of an application to appoint restructuring officers, however, under section 91G of the Companies Act, a creditor of a company can apply to the Court for leave to commence proceedings against the company.

4 marks

Other considerations:

- There are a number of provisions which prescribe specific notice and reporting requirements for the benefit of creditors. **(1 mark)**
- 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 RPLs) - 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 **(1 mark)**
- A requirement for the ROs to report - open and transparent process **(1 mark)**
- The petitions shall be heard in open court unless the Court otherwise directs **(1 mark)**
- The ROs must report within 28 days of appointment **(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)

Pursuant to order 91B (3) of the Companies Act, upon hearing a petition for the appointment of a restructuring officer, the Court may i) make an order (1); ii) adjourn the hearing conditionally or unconditionally (1); iii) dismiss the petition (1); or iv) make any other order as the Court thinks fit (1), except for an order placing the company into official liquidation (1).

The Court may choose to dismiss the petition where there is insufficient evidence to support that the restructuring plan may be a success.

An alternative order for the appointment of inspectors or an independent director could instead be made by the Court.

5 marks

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

**QUESTION 4 FOLLOWS ON NEXT PAGE / . . .**

Commented [BB19]: Question 3.5 - Sub-total = 5/5

#### 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 principal statutes governing the operation of ELPs are the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision) (the "ELP Act"). (1)

Section 3 of the ELP Act provides that the rules of equity and of common law applicable to partnerships (1), excluding certain sections and where there are inconsistencies with the ELP Act, shall apply to ELPs.

Part V of the Companies Act and the CWR also apply to the liquidation and dissolution of the ELPs, where there are inconsistencies the ELP Act takes priority.

##### 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 the circumstances under which the Cayman Islands court has jurisdiction to wind up a foreign company, these include foreign companies which:

- i. has property located in the Cayman Islands;
- ii. is carrying out business in the Cayman Islands;
- iii. is the general partner of a limited partnership; or
- iv. is registered under Part IX of the Companies Act.

A foreign company is required to be registered as a foreign company in the Cayman Islands where it establishes a place of business or commences carrying on business within the Cayman Islands.

##### 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)

Foreign judgments are not enforceable in the Cayman Islands upon execution. Steps can be taken to enforce a foreign judgment pursuant to Cayman Islands statutory and common law.

Commented [BB20]: Question 4.1 - Sub-total = 3/3

Commented [sp21]: Question 4.2 - Sub-total = 5/5

Commented [sp22]: Question 4.3 - Sub-total = 3/3

In Justice Kawaley's judgment in the matter of Guoan International Limited (unreported, 29 October 2021), it was confirmed that a foreign judgment may be relied upon as the basis for a creditor seeking a winding up order without the judgment of the foreign court being registered and / or enforced within the Cayman Islands.

#### Question 4.4

Commented [BB23]: 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 trustee in bankruptcy is appointed to administer the estates of debtors in bankruptcy under the Bankruptcy Act. When a provisional order for bankruptcy has been made, pursuant to the Bankruptcy Act, the property of the debtor shall immediately pass to and vest in the trustee.

Section 38 of the Bankruptcy Act sets out the duties of the trustee. Under this section, until a provisional order has been made absolute, the duty of the Trustee is:

- i. to preserve all property in such state as to permit of its being returned to the debtor in the condition in which it was seized, the event of the revocation of the provisional order; (1)
- ii. make a sale of any part of the debtor's stock-in-trade or other property, and take such other action in the interests of the debtor's estate, as in the ordinary course of the debtor's business may seem expedient.

When the absolute order has been made, the trustee must realise, administer and distribute the debtor's estate for the benefit of the creditors. (1)

Other duties, with examples and reference to the section of the Bankruptcy Act include:

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).

The Trustee must receive and adjudicate the proof of debts (section 87).

TOTAL MARKS: [100]

**\*\* END OF ASSESSMENT \*\***