



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 95/100 -
Excellent achievement!

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

EXAMINERS

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

All candidates are expected to comply with ALL the instructions.

INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) Cayman time on Thursday 23 November 2023** and must be returned / submitted by **13:00 (1 pm) Cayman time on Friday 24 November 2023**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.SummativeAssessment**. An example would be something along the following lines: 202223-336.SummativeAssessment. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.**
6. Enquiries during the time that the assessment is written must be directed to David Burdette at **david.burdette@insol.org** or by WhatsApp on +44 7545 773890 or to Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).
7. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate’s own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of**

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

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 of a nominated official liquidator's consent to act residing in the Cayman Islands are set out in Order 3, rule 4(1) of the Companies Winding Up Rules (2023 Consolidation) (CWR). It states:

'(1) Every petition shall be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator stating that - (1)

- (a) that person is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5; (1)*
- (b) having made due enquiry, that person believes that that person and that person's firm meet the independence requirement contained in Regulation 6; (1)*
- (c) that person and/or that person's firm are in compliance with the insurance requirements contained in Regulation 7; and (1)*
- (d) that person is willing to act as official liquidator if so appointed by the Court.' (1)*

5 marks - none of the below is relevant for the purposes of this answer

It is notable that Bluesea operated across the Caribbean and Latin America and it may be necessary for assets or operations of Bluesea to be managed in foreign jurisdictions. To the extent that it is proposed that a qualified insolvency practitioner be appointed jointly with a foreign practitioner, CWR O.3, r.4(2) states as follows:

'(2) If the petition seeks an order for the appointment of a qualified insolvency practitioner jointly with a foreign practitioner, it shall be supported by an affidavit sworn by the foreign practitioner stating -

- (a) that person's professional qualifications;*
- (b) the country in which that person is qualified to perform functions equivalent to those performed by official liquidators under the Law or by trustees under the Bankruptcy Act (as amended and revised);*
- (c) that person's professional experience;*
- (d) that person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of Regulation 7;*
- (e) if that person has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company or a related party of the company, full particulars of such appointment; and*
- (f) that, having made due enquiry, that person and that person's firm meet independence requirement contained in Regulation 6.'*

Question 2.2

Commented [BB4]: Question 2.2 - Sub-total = 4/5

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

[The issue is whether Bodden & Ebanks Limited have met the requirements to act as a liquidator in relation to Bluesea.

The Insolvency Practitioners' Regulations (2023 Consolidation) (**IP Regs**) contain requirements that need to be met for a person to be eligible to act as an official liquidator. One such requirement is the '*Independence Requirement*'.

The Independence Requirement is set out in Regulation 6 of the IP Regs (1). There it states:

(1) A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of a company unless that person can be properly regarded as independent as regards that company.

(2) A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, has acted in relation to the company as its auditor.' (1)

Whitesands initiated proceedings against Bluesea in May 2023. The Grand Court of the Cayman Islands made a winding up order in respect of Bluesea on 22 August 2023. Pursuant to section 100(2) of the Companies Act (2023 Revision) (**Companies Act**) the winding up of a company is deemed to commence at the time of the presentation of the petition for winding up which in this case would be May 2023. Bodden & Ebanks Limited acted as auditors of Bluesea in 2021. Therefore, Bodden & Ebanks has acted as an auditor of Bluesea within 3 years of the commencement of the liquidation. As a result of this, Bodden & Ebanks limited are not entitled to be appointed by the Court as an official liquidator of Bluesea as they are not properly regarded as independent. (1)

Bodden & Ebanks Limited would have been required to swear an affidavit stating their consent to act which included a statement that they believe that they met the independence requirements set out in Regulation 6 of the IP Regs. This is no longer true and they should bring this to the Court's attention and withdraw their consent to act as

liquidator in respect of Bluesea.] (1)

4 marks

Question 2.3

Commented [BB5]: 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 are not required to have any qualifications to act as the voluntary liquidators of Cheese Limited. Section 120 of the Companies Act states: (1)

'Any person, including a director or officer of the Company, may be appointed as its voluntary liquidator.']

Question 2.3.2 (2/2 marks)

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

[The statutory steps that Tom and Jerry must take within 28 days of their appointment are set out in section 123 of the Companies Act. It states:

'(1) Within twenty-eight days of the commencement of a voluntary winding up, the liquidator or, in the absence of any liquidator, the directors 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) A director or liquidator who fails to comply with this section commits an offence and is liable to a fine of ten thousand dollars.'

In addition to the above, where it is believed that Cheese Limited will be able to pay its debts in full together with interest Tom and Jerry will be required to file a declaration of solvency pursuant to section 124 of the Companies Act. (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)

[As stated in CWR O.13, r.9(1), the basis and amount of Tom and Jerry's remuneration must be authorised by a resolution of Cheese Limited.

As set out in CWR O.13, r.9(2), Cheese Limited may resolve to remunerate Tom and Jerry on the following basis:

1. an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation;
2. a fixed sum;
3. a commission or percentage of the assets distributed or realized; or
4. a combination of these methods. (2)

In addition to the above, CWR O.13, r.9(3) states:

*'(3) The voluntary liquidator shall not be entitled to receive payment of any remuneration out of the company's assets without the prior approval of a resolution passed at a general meeting of the company except that -
(a) the amount of remuneration specified in the voluntary's liquidator's final report and accounts may be paid if the final general meeting has been duly convened but not member attends and votes either in person or by proxy;
and
(b) any remuneration may be paid with the Court's approval.'*

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)

[Section 95(1) of the Companies Act sets out the powers of the Court upon hearing a

Commented [BB6]: Question 2.4 - Sub-total = 2/2

winding up petition. It states:

- '(1) Upon hearing the 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...*

The articles of the company should be reviewed for any provisions which prevent the contributories from petitioning of the winding up pursuant to section 95(2) of the Companies Act. Otherwise, the powers of the Court will be limited and the Court will have to dismiss the winding up petition.

The contributories may wish to petition for a just and equitable winding up on the basis that there is a justifiable loss of confidence due to mismanagement. Where the contributories present a petition on the grounds that it is just and equitable for the company to be wound up, section 95(3) provides the Court with the following powers:

- '(3) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely -*
- (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 authorizing 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 (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)**

[Those who can apply to the Court to remove an official liquidator is set out in section 107 of the Companies Act. Section 107 of the Companies Act states:

'An official liquidator may be removed from office by order of the Court made on

the application of a creditor or contributory of the company.'

Generally, the Court will have a broad discretion when it comes to removing an official liquidator. The applicant will need to show good reasons why an official liquidator should be removed which is the test confirmed in *BTU Power Company* [2019 (1) CILR Note 7] citing *AMP Enterprises Ltd (t/a Total Home Entertainment) v Hoffinan* [2002] BCC 996.

Good reasons for the removal of an official liquidator include the following:

- the official liquidator has a conflict of interest;
- impropriety or misconduct of the official liquidator;
- the official liquidator pursues litigation against the wishes of a creditor; and
- the official liquidator failing to investigate former directors for matters such as misfeasance.

The *BTU* case confirms that generally it would not be sufficient for the replacement of an official liquidator where a creditor has a preference to another official liquidator or the creditor is disgruntled.

CWR O.5, r.6(2) states who an application to remove an official liquidator must be served on:

*'(2) A removal summons shall be served upon -
(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 (5/5 marks)

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

[The circumstances in which a creditor or contributory may apply to remove an official liquidator will depend on the solvency of the Company as that will decide which party has the ultimate interest in the distribution of the company's assets. Therefore, in an insolvent liquidation the creditors are the only parties able to remove the official liquidator.

However, in a solvent liquidation the contributories will be able to remove an official liquidator. Examples of this in operation can be seen in *Johnson and Deloitte & Touche AG* [1999 CILR 120] and more recently in *BTU Power Company* [2019 (1) CILR Note 7].]

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)

Commented [ca8]: Question 2.6 Sub-total =4/4 marks

[The liquidation committee is a body constituted to represent the stakeholders of the company in liquidation and consult with the official liquidator. The eligibility to be a member of the liquidation committee will depend on the solvency determination which is made by the official liquidator.

CWR O.9, r.1(3) and (6) states in relation to the establishment of a liquidation committee:

'(3) The liquidation committee shall comprise not less than three not more than five creditors (if the official liquidator has determined that the company should be regarded as insolvent) or contributories (if the official liquidator has determined that the company should be regarded as solvent).

(6) In the case of a company determined by its official liquidator to be of doubtful solvency, the liquidation committee shall comprise not less than three nor more than six members, of whom a majority shall be creditors elected at a meeting of creditors and at least one of whom shall be a contributory elected at a meeting of contributories.'

As the solvency determination was originally 'insolvent' then the liquidation committee would have comprised of at least three and not more than five creditors.

The solvency determination has moved from insolvent to solvent, the liquidation committee will have to be reconstituted in line with CWR O.9, r.1(3). CWR O.9, r.3 states in respect of the reconstitution of the liquidation committee:

(1) If, during the course of the liquidation, the official liquidator changes the official liquidator's certification of the company's solvency or insolvency (as the case may be), the official liquidator shall take the following steps to reconstitute the liquidation committee.

(2) If the company is certified to be solvent, any creditor members of its liquidation committee shall automatically cease to be members and the official liquidator shall convene a meeting of contributories for the purpose of electing new members from amongst the company's contributories.

(3) If the company is certified to be insolvent, any contributory members of its liquidation committee shall automatically cease to be members and the official liquidator shall convene a meeting of creditors for the purpose of electing new

members from amongst the company's creditors.

(4) Nothing in this rule shall prevent the official liquidator from convening a meeting in anticipation of changing the official liquidator's certification of the company's solvency or insolvency (as the case may be).'

As a result of the new 'solvent' determination, the former creditor members of the liquidation committee will be removed automatically. The official liquidator will have to convene a meeting of contributories for the purpose of electing new members amongst the company's contributories to the liquidation committee. The liquidation committee will then comprise of not less than three and not more than five contributories.]

Question 2.7

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

[Following an order for dissolution the official liquidator is required to file the order with the Registrar pursuant to section 152(3) of the Companies Act. As stated in section 152(4)

'(4) An official liquidator who fails to file the order for dissolution with the Registrar within fourteen days from the date upon which it was perfected, commits an offence and is liable on summary conviction to a penalty of ten dollars for every day during which that person is so in default.'

An order for dissolution will typically be made in the form set out in CWR Form No. 36. This will set out the steps that are required to be completed following the making of an order for dissolution. The order will contain direction for the preservation of the liquidator's files and company's books and records and their destruction. It may also contain other directions which may be necessary including directions relating to the unclaimed dividends. I set out the steps below in more detail in relation to liquidator's files and company's books and records.

The liquidator will also need to take steps to create and maintain a complete record of all the steps taken and work done during the liquidation as stated in CWR O.26, r.2. CWR O.26, r.2(2) states what the liquidation files shall include:

- (2) the liquidation files shall include –*
- (a) a duplication of the Court file;*
 - (b) minutes of the meetings of creditors and/or contributories;*
 - (c) minutes of the meetings of the liquidation committee;*
 - (d) liquidator's reports;*
 - (e) liquidator's accounts;*
 - (f) proofs of debts and records relating to their adjudication;*
 - (g) records relating to the collection and realization of the assets;*

Commented [ca9]: Question 2.7 Subtotal = 5/5 very thorough response good use of references to relevant laws/ rules

- (h) records relating to the liquidation bank accounts;
- (i) liquidator's correspondence; and
- (j) notices sent or published by the liquidator.'

Pursuant to CWR O.26, r.2(3), the liquidator are to retain the liquidation files in safe custody for at least 3 years following the company's dissolution.

Pursuant to CWR O.26, r.3(4), the Court shall give directors in relation to the preservation, storage and destruction of the company's remaining books and records.]

Question 2.8

Commented [BB10]: Question 2.8 -Sub-total = 5/5

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

[As set out in *Gooch's Case* 1872 7 Ch App 207 and applied in the Cayman Islands in *In the Matter of Citrico International Limited* [2004-05 CILR 435] (1) a liquidator has a duty 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 course of his investigation, which is material to ascertain the exact truth in every case before the Court." (1)

The liquidator will be empowered to investigate where section 102(1) of the Companies Act is satisfied which states:

- '(1) Where a winding up order is made by the Court, the liquidator shall be empowered 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, and to make such report, if any, to the Court as that person thinks fit.' (1)

The Companies Act also provides the liquidator with specific tools that they may use to gather further information.

If a winding up order is made, then the liquidator may serve a Companies Act section 101 notice. Pursuant to section 101(3), a section 101 notice can be served on any person who are or has been directors or officers of the company, persons who are or have been professional service providers to the company and persons who are or have been employees of the company, during the period of one year immediately preceding the relevant date. (2) Thought it should be noted that professional service providers does not include auditors. Any person served with a section 101 notice will be required to provide a statement with the information specified in section 101(2) of the Companies Act:

- '(2) The statement shall be verified by an affidavit sworn by the persons required to submit it and shall show -
- (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.

A liquidator may also use its powers under section 103(3) to order the examination of any relevant person or that a relevant person transfer or deliver to the liquidator property or documents belonging to the company. Section 103 applies to any person set out in section 103(1) of the Companies Act including those who have made a statement of affairs, directors or officers, professional service providers to the company, those who acted as controllers, etc. Again section 103(1) does not apply to auditors.

Pursuant to section 139(1) of the Companies Act, a liquidator also has the power to get in any property or documents to which the company appears entitled.

Finally, if a liquidator has obtained directions from the Court, pursuant to section 102(2) of the Companies Act a liquidator has the power to assist the Cayman Islands Monetary Authority or the Royal Cayman Islands Police Service to institute criminal proceedings and investigate people referred to in section 101(3) of the Companies Act.] (1)

A good answer.

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)

[The meaning of 'relevant date' is set out in section 101(6) of the Companies Act. It states:

- '(6) In this section -*
'relevant date' means -
(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.'

This 'relevant date' may be earlier depending on the commencement of winding up set out in section 100(1) **In many cases, this is the presentation of the winding up petition (pursuant to section 100(2))** which states: (1)

- '(1) If, before the presentation of a petition for the winding up of a company by the Court -*

(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;

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 (1)

(d) a restructuring officer has been appointed pursuant to section 91B or 91C and the order appointing the restructuring officer has not been discharged,

the winding up of the company is deemed to have commenced at the time of passing of the relevant resolution or the expiry of the relevant period or the occurrence of the relevant event or the date of the presentation of the petition to appoint a restructuring officer pursuant to 91B. (2) In any other circumstances not specified in subsection (1), the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up.] (1)

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

QUESTION 3 FOLLOWS ON NEXT PAGE / . . .

QUESTION 3 - CORPORATE RESCUE (20 MARKS)

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

FACT PATTERN

SMB TECH CORPORATION

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

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

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

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

Question 3.1

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

Commented [BB12]: Question 3.1 - Sub-total = 5/5

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

[The chosen provisional liquidator is based in Hong Kong (1). Pursuant to section 108(1) of the Companies Act (2023 Revision) (**Companies Act**) 'A foreign practitioner may be appointed to act jointly with a qualified insolvency practitioner.' (1)

In section 89 of the Companies Act, a 'foreign practitioner' is defined as 'a person who is qualified under the law of a foreign country to perform functions equivalent to those performed by official liquidators under this Law or by trustees in bankruptcy under the Bankruptcy Act (1997 Revision)' In the same section, a 'qualified insolvency practitioner' is defined as 'a person holding the qualification specified in the regulations made by the Insolvency Rules Committee under section 155 or such other qualification as the Court considers appropriate for the conduct of the winding up of a company'.

Regulation 8(1) of the Insolvency Practitioners' Regulations (2023 Consolidation) (**IP Regs**) provides as follows in relation to foreign practitioners:

'(1) A foreign practitioner who meets the independence and insurance requirements of Regulations 6 and 7 may be appointed by the Court as an official liquidator of a company jointly with a qualified insolvency practitioner (but not as sole official liquidator).' (1)

Regulation 7(1) IP Regs provides the insurance requirements:

'(1) A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless that person and the firm of which that person is a partner or employee or the company of which that person is a director or an employee, 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 the negligent performance or non-performance of the qualified insolvency practitioner's duties as an official liquidator generally.' (1)

In respect of 'official liquidator' it is defined in section 89 of the Companies Act as 'the liquidator of a company which is being wound up by order of the Court or under the supervision of the Court and includes a provisional liquidator'. Therefore, the IP Regs will apply equally to provisional liquidators.

The chosen provisional liquidator of the contributors of SMB has professional indemnity insurance up to a limit of US\$5 million in respect of each and every claim. This does not meet the threshold as set out in regulation 7 of the IP Regs. Therefore, if they are not willing to increase the sum of insurance to meet this requirement then they will not be permitted by the Court to act as the provisional liquidator of the company.] (1)

5 Marks - excellent structured answer, well done!

Question 3.2

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

[As set out in section 91B of the Companies Act, the company must demonstrate that:

1. The company is or is likely to become unable to pay its debts within the meaning of section 93 of the Companies Act. (1)
2. The company 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)

Section 91B of the Companies Act was considered in *Re Oriente Group Limited* (unreported, 9 December 2022). The judgment clarified that (1) 'The solvency test for restructuring purposes is the same as that applicable to winding-up proceedings as well (section 93 of the Act, "Definition of Inability to pay debts")' and (2) the statutory scheme of provisional liquidations under section 104(3) 'applies with equal force to the restructuring officer regime'.]

2 marks

Question 3.3

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

[A restructuring petition is required to be advertised in the form set out in Form 3A of the Companies Winding Up Rules (2023 Consolidation) (CWR). In addition, CWR O.1A, r.1 sets out the advertisement requirements of a petition which includes *inter alia* the following:

1. Pursuant to CWR O.1A, r.1(3), unless the Court otherwise directs, once in a newspaper circulated in the Cayman Islands. (½)
2. Pursuant to CWR O.1A, r.1(4), unless the Court otherwise directs, in a newspaper circulated in the countries where the petition is most likely to be brought to the attention of creditors or contributories if the company is carrying on business outside the Cayman Islands.] (½)

For an additional mark you must include the time frames for the advertising ie - no more than seven business days after the filing of a Restructuring Petition (1/2 mark) and not less than seven business days before the hearing date (1/2 mark).

Question 3.4

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

Commented [BB13]: Question 3.2 - Sub-total = 2/2

Commented [BB14]: Question 3.3 - Sub-total = 1/2

Commented [BB15]: Question 3.4 - Sub-total = 5/6

[There are a number of protections provided to safeguard the interest of creditors. These include:

1. A creditor will have standing to be heard at the hearing of a petition to appoint a restructuring officer. This safeguard allows a creditor to make his concerns known to the Court. (1)
2. Pursuant to section 91E of the Companies Act, a creditor may apply by way of summons to the Court for the variation or discharge of the order appointing the restructuring officer. This safeguard allows a creditor to vary the terms of the appointment of the restructuring officer which is an important safeguard as the terms of appointment may have an impact on the restructuring officer's relationship with the creditors and their interest. (1)
3. Pursuant to section 91F of the Companies Act, a creditor may apply for the removal from office of a restructuring officer. This important safeguard allows creditors to remove and appoint another restructuring officer where the creditor is concerned the restructuring officer is not having regard to the creditor's interests. (1)
4. Pursuant to section 91H of the Companies Act, a creditor with security over the whole or part of the assets of a company is entitled to enforce the creditor's security without the leave of the Court and without reference to the restructuring officer. The Cayman Islands is a creditor friendly jurisdiction and this means where the creditor has security that they will not be prevented from enforcing that security simply because a restructuring officer has been appointed. (1)
5. With leave of the Court, a creditor will still be able to present a winding up petition even after a restructuring petition has been presented. This is important as it will provide another route for creditors to proceed under where they feel their interests are better served with the company being wound up.
6. The new restructuring officer regime also provides for tight limits for advertising under CWR O.1A, r.1 which protect the interests of creditors by giving them an opportunity to be heard in relation to the restructuring petition as soon as possible. This is especially important as the stay of proceedings found in section 91G of the Companies Act operates from the date a petition to appoint restructuring officers is filed which is earlier than would be the case in a winding-up stay. This protects creditors by preventing a statutory moratorium being put in place without the substantive application or a genuine intention to restructure the company.] (1)

5 Marks - plus any of the below

- 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)

Question 3.5

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

[The relief that a Court may or may not give upon hearing a restructuring petition is set out in the Companies Act. Pursuant to section 91B(3):

- '(3) The Court may, on hearing a petition under subsection (1)*
- (a) make an order appointing a restructuring officer; (1)*
 - (b) adjourn the hearing conditionally or unconditionally; (1)*
 - (c) dismiss the petition; or (1)*
 - (d) make any other order as the Court thinks fit (1), except an order placing the company into official liquidation (1), which the Court may only make in accordance with section 92 and 95 if a winding up petition has been presented in accordance with section 91G and 94.'*

Therefore, the Court will not have the power to wind up a company on the basis of a restructuring petition.]

5 Marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

Commented [BB16]: 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 operation of an ELP will also be governed by statute. In particular, the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision) (1). There are certain aspects of the operation of an ELP which will also be governed by the Companies Act (2023 Revision) and the Companies Winding Up Rules (2023 Consolidation) such as the liquidation and dissolution of an ELP.]

In addition, the principles of common law and equity applicable to partnerships (1 mark) also govern the operation of ELPs.

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 (2023 Revision) sets out when the Cayman Islands court has jurisdiction to wind up a foreign company. It states as follows:

'91. The Court has jurisdiction to make winding up orders in respect of-

...

(d) a foreign company which -

- (i) has property located in the Islands;
- (ii) is carrying on business in the Islands;
- (iii) is the general partner of a limited partnership; or
- (iv) is registered under Part IX.'

Pursuant to Part IX, a foreign company is required to register in the Cayman Islands where it carries on business in the Cayman Islands or establishes a place of business. Therefore, where a foreign company has registered in the Cayman Islands it will also be able to be wound up in the Cayman Islands as indicated in section 91(d).]

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)

Commented [BB17]: Question 4.1 - Sub-total = 2/3

Commented [sp18]: Question 4.2 - Sub-total = 5/5

Commented [sp19]: Question 4.3 - Sub-total = 3/3

[Typically, the judgment of a foreign court has no legal effect in the Cayman Islands. However, Kawaley J confirmed in the first instance judgment of *Guoan International Limited* (unreported, 29 October 2021) that a creditor can rely on a foreign judgment that has not been registered or enforced in the Cayman Islands as the basis for seeking a winding up order. This is the case where the foreign judgment was entitled to recognition, it was final notwithstanding an appeal and it was not disputed. This is also in reliance on *Re China Hospitals* [2018 (2) CILR 335] where it was established that a foreign arbitration award could be recognized as the basis for a winding-up petition without first being formally enforced by the Court. Additionally, Kawaley J recognized that it would be in the interest of comity for a foreign judgment to be relied upon for the basis of seeking a winding up order even if it has not been registered in the Cayman Islands especially where parallel or related foreign proceedings are involved.]

Question 4.4

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

[As set out in section 38 of the Bankruptcy Act (1997 Revision) (the **Bankruptcy Act**), it is the duty of the trustee in bankruptcy to preserve the property such that the property may be returned to the debtor in a scenario where the provisional order is revoked. (1) Section 38 of the Bankruptcy Act (1997 Revision) states as follows:

'Until the provisional order is made absolute, it shall be the duty of the Trustee, as far as the nature of the property seized permits, to preserve all such property in such state as to permit of its being returned to the debtor in the condition in which it was when it was seized, in the event of the revocation of the provisional order:

Provided that the Trustee may, before any such order is made absolute, make sales 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.'

Pursuant to section 43 of the Bankruptcy Act, the trustee in bankruptcy shall attend the meeting of the creditors, and shall receive and decide upon proofs of debts in the prescribed manner, and insofar as it may be necessary for determining the right of voting at such meeting.

Pursuant to section 67 of the Bankruptcy Act, the trustee in bankruptcy has a duty, as soon as possible after the public examination of a debtor, to make a report as to the state of the debtor's affairs and to the conduct of the debtor before and during the bankruptcy.

As set out in section 79 of the Bankruptcy Act, the trustee in bankruptcy has the power to carry on the trade of a debtor as is necessary or expedient for the beneficial winding up or sale of the business. (1) Section 79 states as follows:

'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 same, and for that purpose, or for the general management and realization of his property, employ the debtor himself or any other person or persons.'

As set out in section 80 of the Bankruptcy Act, the trustee in bankruptcy has the power to bring or defend actions relating to the property of the debtor. (1) Section 80 states as follows:

'The Trustee may bring, institute or defend any action or other legal proceedings relating to the property of the debtor.'

As stated in section 87 of the Bankruptcy Act *'The Trustee shall receive and decide on proofs of debts.'* (1)

Where an absolute order has been made, section 65 states as follows:

'When an absolute order for bankruptcy has been made against a debtor the Trustee shall proceed to administer the debtor's estate for the benefit of the creditors subject to this Act.'

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****