



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 82/100
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

Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers
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MODERATORS

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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 = 19/20

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.

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

Question 1.15

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

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

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

Question 1.16

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

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

Question 1.17

Select the **correct** statement:

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

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

Question 1.18

Choose the **correct** statement:

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

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

Question 1.19

Select the **correct** statement:

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

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

Question 1.20

Select the **correct** statement:

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

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

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

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

Question 2.1

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)

As per Order 3, Rule 4 of the Cayman Islands Companies' Winding Up Rules (2023 Consolidation), the consent to act shall be presented in the form of an affidavit sworn by the person or persons nominated for appointment as official liquidator stating that (1):

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

5 marks - the rest of the answer below wasn't necessary

The petition would likely seek to appoint joint official liquidators based in the Cayman Islands, given that the company is domiciled in the Cayman Islands. However, if the petition were to seek an order for the appointment of a qualified insolvency practitioner jointly with a foreign practitioner, it would be supported by an affidavit sworn by the foreign practitioner stating:

- that person's professional qualifications;
- 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);
- that person's professional experience;
- 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;
- 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
- that, having made due enquiry, that person and that person's firm meet independence requirement contained in Regulation 6.

A creditor's winding up petition, together with the verifying and supporting affidavits (containing the liquidator's consent to act) and notice of hearing must be served upon the company through delivery to their registered office immediately after the petition is presented. An affidavit of service is also required to be filed within seven days of the presentation of every creditor's petition.

The affidavit verifying the petition is required to be sworn by:

Commented [BB4]: Question 2.1 - Sub-total = 5/5

- the petitioner; or
- the voluntary liquidator; or
- any director, officer or agent of the petitioner who has been concerned in and has knowledge of the matters giving rise to the petition; and
- the person or persons nominated for appointment as official liquidator and containing the information required by Order 3, Rule 4 of the Companies' Winding Up Rules (unless the voluntary liquidator is a qualified insolvency practitioner who is willing and able to accept appointment as official liquidator).

The affidavit must verify that the statements given in the petition are true or at least are true to the best of the deponent's knowledge, information and belief. For the proposed official liquidator, this normally relates to the introductory conversations had with the company or their counsel and introductory information provided.

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)**

Assuming that the proposed liquidators from Bodden & Ebanks reside and practice in the Cayman Islands (which can be done based on the facts above), they are violating the fundamental principle of Objectivity (from the Cayman Islands Institute of Professional Accountants' Code of Ethics) given their potential conflict of interest as the former auditor for Bluesea. A qualified IP should refuse to remain associated with the matter creating the conflict i.e. conflict threats that are not at an acceptable level.

One of the official liquidators' duties would be to provide notice of their appointment to the company's former service providers and request information on the company from these providers. However, the official liquidator at Bodden & Ebanks Limited could not reach out to the former auditors at Bodden & Ebanks Limited as they are the same firm, which is inherently a conflict of interest.

Further, as per the Companies' Act s.110(5), for the purposes of exercising certain of the official liquidators' powers (as specified in Schedule 3) a person shall be treated as related to a company if the person has acted for the company as a professional service provider. Given that Bodden & Ebanks have previously acted for the company as a professional service provider, they should be considered as related to the company.

At the winding up hearing, the Court should dismiss the petition or adjourn the hearing conditionally or unconditionally until new liquidators are proposed (as per the

Commented [BB5]: Question 2.2 - Sub-total = 1/5

Companies' Act s. 95 - Powers of the Court).

However, after this information came to light, Bodden & Ebanks should officially withdraw their names as proposed liquidators (1) and request that the winding up petition is amended following instruction from the Court at the winding up hearing.

In the event that Bodden & Ebanks were somehow appointed as official liquidators by the Court following the winding up hearing, they should take the following steps in accordance with Order 5, rule 4 of the Companies' Winding Up Rules (2023 Consolidation) to resign:

- prepare a report and accounts as per the Companies' Winding Up Rules (2023 Consolidation) Order 10, Rule 2;
- give notice of their resignation to the company's liquidation committee; and
- apply to the Court for an order that they be released from the performance of any further duties.

1 mark - see below, the candidate has failed to talk about the independence requirements as required under the IPRs. It's not seeking a discussion about resignation post appointment.

Unfortunately, based upon this new information coming to light, the proposed liquidators put forward by Whitesand would not be able to act as official liquidators. (1 mark)

Regulation 6 of the Insolvency Practitioners Regulations set out the independence requirements (1 mark) and state:

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

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 he is a partner or employee, has acted in relation to the company as its auditor. (1 mark)

In this scenario the winding up petition date is May 2023 and therefore the proposed liquidators have acted as auditors within the 3 years immediately preceding the commencement of the liquidation. Given Bodden & Ebanks Limited acted as auditors as recently as 2021 that the proposed liquidators would not be regarded as independent. (1 mark)

In respect of the already provided consents to act, they should be withdrawn and rescinded as a matter of urgency. (1 mark)

Question 2.3

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.

Commented [BB6]: Question 2.3 -Sub-total = 5/5

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

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

There are no qualification requirements for Tom and Jerry to be appointed as voluntary liquidators. Any person, including a director or officer of the company, may be appointed as its voluntary liquidator. (1)

Question 2.3.2 (2/2 marks)

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

Within 28 days of the commencement of their appointment, Tom and Jerry must:

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

If Tom and Jerry fail to comply with this section, they will have committed an offence and they are liable to a fine of ten thousand dollars. (2)

Question 2.3.3 (2/2 marks)

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

The company may resolve to remunerate the voluntary liquidator on the basis of:

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

As per the Companies' Act s.130:

- the expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims;
- the rate and amount of the liquidator's remuneration shall be fixed and payment authorised by resolution of the company;
- each report and account laid before the company in general meetings by its liquidator shall contain all such information, including the rate at which the liquidator's remuneration is calculated and particulars of the work done, as may be necessary to enable the members to determine what expenses have been properly incurred and what remuneration is properly payable to the liquidator; and
- if the company fails to approve the liquidator's remuneration and expenses or the liquidator is dissatisfied with the decision of the company, that person may apply to the Court which shall fix the rate and amount of that person's remuneration and expenses.

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)

As per the Companies' Act s.95, upon hearing the winding up petition the Court may:

- dismiss the petition;
- adjourn the hearing conditionally or unconditionally;
- make a provisional order; or
- any other order that it thinks fit,

but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets. The Court shall also dismiss a winding up petition or adjourn the hearing of a winding up petition on the grounds that the petitioner is contractually bound not to present a petition against the company.

The Court maintains general discretion to grant the provisional liquidators such powers as the Court considers necessary and appropriate to prevent such dissipation, misuse, mismanagement and misconduct and to ensure the company's assets are properly protected pending the hearing of the winding up petition.

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)

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

Commented [BB8]: Question 2.5 - Sub-total = 8.5/9

To remove official liquidators, one must look to the Companies' Act s.107 which states that 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.

Further, in the Companies' Winding Up Rules (2023 Consolidation) Order 5, Rule 6 it states that an application by a creditor or contributory for an order that the official liquidator be removed shall be made by summons, otherwise known as a "removal summons", which shall be served upon:

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

A removal summons shall also:

- be supported by an affidavit containing all the facts and matters relied upon;
- must nominate qualified insolvency practitioner whom the Court can appoint in succession to the removed liquidator and every person so nominated must swear an affidavit which complies with the requirements of Order 3, rule 4; and
- entitle the official liquidator to at least 14 days' notice.

An official liquidator who is removed by order of the Court shall:

- forthwith deliver to the official liquidator's successor the company's books and records and a copy of the official liquidator's liquidation files (maintained in accordance with Order 26, rule 2); and
- within 28 days prepare a report and accounts for which purpose the official liquidator shall be allowed unrestricted access to the company's books and records.

The only parties who may apply to remove an official liquidator are creditors, in the case of a insolvent liquidation, and contributories, in the case of a solvent liquidation, on the basis that they are the only parties with the ultimate interest in the distribution of the company's assets.

The Court, which has broad discretion to remove official liquidators, may do so if it is reasonably demonstrated that the official liquidator:

- has a conflict of interest;
- pursues litigation against the wishes of a creditor;
- impropriety or misconduct; or
- fails to investigate matters such as misfeasance by former directors.

Examples of reasons that are not sufficient to remove an official liquidator are:

- a creditor's preference for an alternative liquidator; or
- a disgruntled creditor,

however, the Court will always consider removal if it will be for the general advantage of

the majority of the interested parties in the liquidation.

Question 2.5.2 (4.5/5 marks)

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

It makes sense that creditors are able to apply to remove official liquidators in the case of an insolvent liquidation and vice versa with contributories in a solvent liquidation as those parties have the ultimate interest in the distribution of the company's assets, which the official liquidator fundamentally controls.

As an example, *in the matter of BTU Power Company 14 February 2019*, the former director of BTU Power Company (the "Company") applied for the removal and replacement of the JOLs after making very serious allegations of wrongdoing against the JOLs. The winding up petition of the Company was initially brought by the Company's preference shareholders, supported by all of the preference shareholders, and there was no opposition to the winding up order. The Company held assets of considerable value and the JOLs distributed approximately \$33.3 million in dividends to preference shareholders, who had an economic interest in the liquidation for the Company which was solvent. The applicant had his motion denied as his allegations did not amount to anything that would justify the removal of the JOLs which would have been disruptive and to the great disadvantage of the contributories in the liquidation who had economic interests in the liquidation.

It should not be seen as easy to remove a liquidator so as to encourage applications by creditors (in solvent liquidations) contributories (in insolvent liquidations) or even former directors in the case as mentioned above who had not had their preferred liquidators appointed or who were for some other reason disgruntled.

Commented [ni9]: you have these the wrong way around

2.6 Question

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 [ca10]: Question 2.6 subtotal = 4/4 marks. Demonstrates a high level of understanding.

With the official liquidators' change in his/her determination of the solvency of the company, the official liquidator will file a revised certificate of solvency (CWR Form 14) with the Court. This certificate will note the change in the solvency determination for the purposes of the Companies' Act s.110(4) and the Companies' Winding Up Rules (2023 Consolidation) Orders 8 and 9 with effect from the date of the certificate. It is noted that the official liquidator may change the determination again in the light of further changes of relevant circumstances and/or the official liquidator's assessment of the company's

financial position.

Following the change in solvency, the company's liquidation committee will dissolve and will need to be reconstituted. If the company's solvency was changed from insolvent to solvent, then the official liquidator will need to hold a meeting of contributories pursuant to the Companies' Winding Up Rules (2023 Consolidation) Order 8, Rule 1. As the company is now considered to be solvent, the liquidator will convene meetings of its contributories only. At this meeting, the liquidator will table a resolution to reconstitute the liquidation committee which shall comprise not less than three nor more than five contributories (Order 9, Rule 1). The quorum for a contributories' meeting is whatever number is specified in the company's articles of association as the quorum for a general meeting of the company. At a contributories' meeting, a resolution is passed when a majority in value (determined in accordance with Order 8, Rule 9(3) of those present and voting, in person or by proxy, have voted in favour of the resolution.

Then, the liquidator must file a new certificate in CWR Form 15 with the Court to constitute the liquidation committee which shall state the name, address and contact details of the new members of the committee. The liquidation committee does not exist and cannot act until this CWR Form 15 is filed with the Court.

After the liquidation committee has been established, the official liquidator may, with the consent of a majority of the remaining members of the committee, appoint a creditor or contributory (as the case may be) to fill any vacancy. As such, if there are not enough contributories who accept nominations to the newly reformed liquidation committee, creditors can put forward their nominations to sit on the liquidation committee.

The liquidation committee acts as a sounding board for the official liquidators and is statutorily required to review the official liquidators' remuneration and must be established unless the Court orders otherwise.

Question 2.7

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

Once the affairs of the company have been completely wound up, the official liquidator must publish his final report and accounts in accordance with the Companies' Winding Up Rules Order 22, Rule 1(1) and apply to the Court for an order under the Companies' Act s.152 that the company be dissolved. The official liquidators' final report and accounts must contain:

- notice of the date upon which his application for an order for dissolution will be heard by the Court; and
- a statement of the fact that any creditor (in the case of an insolvent company) or member (in the case of solvent company) may appear and be heard on the application.

The official liquidator must then publish a notice of the hearing of the application in one

Commented [ca11]: Question 2.7 Subtotal - 5/5. Very detailed response however there were some aspects that didnt need to be dealt with ie publishing of accounts as this would happen prior to seeking an order for dissolution.

or more newspapers circulating in a country or countries in which the company appears most likely to have creditors, and any such notice must be published at least 14 days prior to the date of the hearing.

The liquidator will need to take the following steps in relation to an order for dissolution, as per the Companies' Winding Up Rules Order 22, Rule 2:

- an order for dissolution shall be in CWR Form 36;
- an order for dissolution shall take effect upon the date upon which it is made or such later date specified in the order;
- the official liquidator shall file the order for dissolution with the Registrar of Companies within 14 days from the date upon which the order is perfected;
- an order for dissolution shall include supplementary directions relating to:
 - 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;
 - the retention, storage and destruction of the company's books and records pursuant to Order 25, rule 2;
 - 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
 - such other consequential matters as the Court thinks fit.

Further, the liquidator needs to file its application for dissolution and secure a hearing date before finalising the final report to creditors to ensure that all relevant information can be included in their report.

Following the dissolution of a company, the liquidator must retain the liquidation files in safe custody for at least three years, as per the Companies' Winding Up Rules Order 26, Rule 2(3). The liquidation files shall include:

- a duplicate of the Court file;
- minutes of the meetings of creditors and/or contributories;
- minutes of the meetings of the liquidation committee;
- liquidator's reports;
- liquidator's accounts;
- proofs of debt and records relating to their adjudication;
- records relating to the collection and realisation of the assets;
- records relating to the liquidation bank accounts;
- liquidator's correspondence; and
- notices sent or published by the liquidator.

In the dissolution order, the Court must give directions in respect of the preservation, storage and destruction of the company's remaining books and records pursuant to Order 26, Rule 3(4) of the Companies' Winding Up rules. Further, in accordance with Order 26, Rule 3(6), the cost of post-dissolution storage and destruction of a company's books and records will be an expense of the liquidation for which provision must be made in the official liquidator's final accounts.

A dissolution order can preserve residual duties for the official liquidator, usually related to the handling of the company's remaining books and records and dealings with unclaimed dividends. Apart from these residual duties, the official liquidator's duties as officeholder cease upon making an order dissolving a company and an order for their discharge is often included in the order for dissolution.

Question 2.8

Commented [BB12]: Question 2.8 - Sub-total = 4.5/5

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

As per the Companies' Act s.102, where a winding up order is made by the Court, the liquidator shall be empowered to investigate:

- if the company has failed, the causes of the failure; and
- generally, the promotion, business, dealings and affairs of the company, and make such report, if any, to the Court as that person thinks fit. (1)

An official liquidator is an officer of the Court and is required 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. (½) cite case law to substantiate this statement

An official liquidator has broad investigative powers which are provided to him/her by the Companies' Act or by the Court with sanction. The official liquidator has the following powers (as per Schedule 1, Part II of the Companies' Act) which are exercisable with or without sanction from the Court:

- 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;
- the power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal;
- the power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against that person's estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors;
- the power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with the respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;
- the power to promote a scheme of arrangement pursuant to the Companies' Act s.86;
- the power to convene meetings of creditors and contributories; and
- the power to do all other things incidental to the exercise of that person's powers.

The official liquidator can be granted the following powers by the Court (as set out in Schedule 3, Part I of the Companies' Act) which are exercisable with sanction:

- the power to bring or defend any action or other legal proceeding in the name and on behalf of the company.
- the power to carry on the business of the company so far as may be necessary for its beneficial winding up.
- the power to dispose of any property of the company to a person who is or was related to the company.
- the power to pay any class of creditors in full.
- the power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.
- the power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.
- the power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.
- the power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.
- the power to raise or borrow money and grant securities therefor over the property of the company.
- the power to engage staff (whether or not as employees of the company) to assist that person in the performance of that person's functions.
- the power to engage attorneys and other professionally qualified persons to assist that person in the performance of that person's functions.

In respect of the above powers, any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of such powers by way of a sanction application. In the case of a:

- a solvent company, a sanction application may only be made by a contributory and the creditors shall have no right to be heard;
- an insolvent company, a sanction application may only be made by a creditor and the contributories shall have no right to be heard; and
- a company whose solvency is doubtful, a sanction application may be made by both contributories and creditors and both contributories and creditors shall have a right to be heard.

The official liquidator may also seek permission from the Court to:

- assist the Authority or Royal Cayman Islands Police Service to investigate the conduct of certain directors, officers, professional service providers, and recent employees of the company; and

- institute and conduct a criminal prosecution of those same persons.

These directions may include a direction that the whole or part of the costs of investigation and prosecution be paid out of the assets of the company. (1)

Pursuant to the Companies' Act s.101, where the Court has made a winding up order or appointed a provisional liquidator, the liquidator may require some or all of the persons mentioned in subsection (3) to prepare and submit to that person a statement in the prescribed form as to the affairs of the company. The statement shall be verified by an affidavit sworn by the persons required to submit it and shall show:

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

The persons referred to in subsection (1) are:

- persons who are or have 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 (1), during the period of one year immediately preceding the relevant date. (1)

With respect to a provisional liquidator, he/she shall carry out only such functions as the Court may confer on that person and that person's powers may be limited by the order appointing that person. To that end, the powers stated in the appointment order must be justified and tailored to meet the specific needs of the company. There are further limited investigatory powers that provisional liquidators may deploy to require certain relevant persons to provide information which essentially entails requiring certain persons to furnish statements as to the affairs of the company.

With respect to a voluntary liquidator, he/she is not provided with any specific investigative powers except for what are stipulated by the resolutions by the contributories to appoint the voluntary liquidators. However, the voluntary liquidator has a duty to request and review the books and records of the company to verify the company's financial position to be included in his/her final report and accounts.

A good answer, however, ensure that your answer is commensurate with the mark allocation. You provided way too much, and unnecessary information that was not asked in the question.

Question 2.9

Commented [BB13]: Question 2.9 - Sub-total = 3.5/5

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

As per the Companies’ Act s.101, the official liquidator may require some or all of the persons mentioned in subsection (3) to prepare and submit to that person a statement in the prescribed form as to the affairs of the company. These statements are to be verified by way of a properly executed affidavit no later than 21 clear days following the request and should include the following:

- particulars of the company’s assets and liabilities, including contingent and prospective liabilities;
- the names and addresses of any persons having possession of the company’s assets;
- the assets of the company held by those persons;
- the names and addresses of the company’s creditors;
- the securities held by those creditors;
- the dates when the securities were respectively given; and
- such further or other information that the liquidator may require.

As per the Companies’ Act s.103, the persons referred to in subsection (1) are:

- persons who are or have 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.

Unnecessary information in your answer which does not address the question.

In this section, the relevant date means:

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

The commencement of the winding up, as it relates to an official liquidation, refers to the date of the presentation of the winding up petition to the Court. **(½)**

section 101 of the Companies Act - In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)). If, before the presentation of a petition for the winding up of a company by the Court:

- a resolution has been passed by the company for voluntary winding up; **(1)**
- the period, if any, fixed for the duration of the company by the articles of association has expired; **(1)**
- 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
- 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 **(1)** or the date of the presentation of the petition to appoint a restructuring officer pursuant to section 91B.

**** 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 [BB14]: Question 3.1 - Sub-total = 1.5/5

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

To be appointed by the Grand Court of the Cayman Islands, a qualified insolvency practitioner must hold professional indemnity insurance of at least USD10,000,000 in respect of each and every claim and at least USD20,000,000 in the aggregate with a deductible of not more than USD1,000,000 in respect of the negligent or non-performance of their duties as a liquidator (1/2). As such, this should give the contributories further comfort that a Cayman Islands liquidator will have higher indemnity insurance than the chosen provisional liquidator in Hong Kong. The nature and scope of professional indemnity insurance, if any, required to be held by persons appointed to the office of official liquidator is specified by the rules made by the Insolvency Rules Committee of the Cayman Islands.

Commented [jo15]: Only a half mark awarded here, this is all technically correct but should have quoted where this comes from ie IPR Reg 7

The chosen provisional liquidator from Hong Kong (1) could be appointed in the Cayman Islands as a joint provisional liquidator, likely alongside a joint provisional liquidator from the Cayman Islands if appointed by the Court any time after the presentation of a winding up petition but before the making of a winding up order on the grounds that:

- there is a prima facie case for making a winding up order; and
- the appointment of a provisional liquidator is necessary in order to:
 - prevent the dissipation or misuse of the company's assets;
 - prevent the oppression of minority shareholders; or
 - prevent mismanagement or misconduct on the part of the company's directors.

The chosen provisional liquidator may also be appointed by the Court as a restructuring officer as the Court retains a discretion to appoint a foreign practitioner in appropriate cases on the basis that a foreign practitioner must not be appointed as the sole restructuring officer of the company. The Court may appoint two or more persons as restructuring officers and they must be authorized to act jointly and severally, unless otherwise ordered by the Court.

The Insolvency Practitioners' Regulations which regulate the identity of an official liquidator will apply *mutatis mutandis* (with the necessary modifications) to restructuring officers, save for the Independence Requirement under Regulation 6, which applies to restructuring officers notwithstanding that he/she (or the firm or company of which he/she is a partner/director or employee) has previously provided advice to the company as a financial advisor or otherwise. In other words, a qualified IP is properly regarded as independent to be appointed as a restructuring officer of a company even if they have previously provided financial or other advice to the company.

In the matter of Sun Cheong Creative Development Holdings Limited (FSD 169 of 2020), the Chief Justice of the Grand Court of the Cayman Islands held that the Grand Court would be slow to give primacy to winding up proceedings of a Cayman Islands company before a foreign court (in this instance there were two competing winding up petitions filed in the High Court of Hong Kong) where the company intended to present a plan to

restructure/reorganize its debt for the benefit of its creditors. As such, the Grand Court may not prefer an official liquidation petition in the Cayman Islands if SMB Tech changes its tune and begins to make sincere efforts to reorganize in Hong Kong.

1.5 marks - no reference to IPR 7, no reference to IPR 8 which would have crossed referenced you back to IPR 7 and the insurance requirements also applying equally to foreign practitioners. Question has nothing to do with RO legislation/appointments. The main essence of the question was to pick up on the fact that the chosen provisional liquidator didn't have sufficient insurance cover to act, and unless they were willing to increase their insurance coverage then they wouldn't be able to act.

Question 3.2

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

Under section 91B(1) of the Companies (Amendment) Act, a company may present a petition to the Grand Court for the appointment of restructuring officers on the grounds that it:

- is likely to become unable to pay its debts; and (1)
- intends to present a compromise or arrangement to its creditors (a Restructuring Petition), (1)

and this two-limb test must be satisfied as requirements for the Court to appoint the restructuring officers.

The Court upheld that the interpretation of this test applies with equal force to the restructuring officer regime as it did with the provisional liquidator regime in the matter *Re Oriente Group Limite*. In this case, the Justice held that case law relating to the "light touch" provisional liquidation regime was pertinent to the restructuring officer regime, notably, the direction to appoint a restructuring officer is a broad discretionary jurisdiction to be exercised where the court is satisfied:

- that the statutory precondition of insolvency or likely insolvency of the company is met by credible evidence;
- the statutory precondition of an intention to present a restructuring proposal to creditors or any class thereof is met by credible evidence of a rational proposal with reasonable prospects of success; and
- the proposal has or will attract the support of a majority of creditors as a more favourable alternative to a winding up of the company.

A Restructuring Petition must be set out in Form Number 2A of the Companies' Winding Up Rules and may be presented without a resolution of the company's members or an express power in its articles of association. Further, the petition is required to contain:

- a concise statement of the grounds upon which the appointment of the restructuring officer is sought;
- the name and address of the person or persons whom the petitioner nominates for the appointment as a restructuring officer; and

Commented [BB16]: Question 3.2 - Sub-total = 2/2

- a statement that the company either acting by the directors or the restructuring officer intends to present a compromise or arrangement to its creditors either pursuant to the Companies Act, the law of a foreign country, or by way of a consensual restructuring.

The company must also pay the filing fee prescribed in the First Schedule of the Court Fee Rules, which is currently KYD5,000.

2 marks, most of the above not necessary

Question 3.3

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

Unless the Grand Court otherwise orders, once the Restructuring Petition is presented it is required to be advertised in accordance with Form Number 3A of the Companies' Winding Up Rules:

- once in a newspaper having circulation in the Cayman Islands; and (½)
- in a newspaper having circulation in a country (or countries) in which the petition is most likely to come to the attention of the company's creditors and contributories. (½)

The advertisements are required to appear no more than seven business days after the filing of a Restructuring Petition (½) and not less than seven business days before the hearing date. (½)

Restructuring officers must otherwise give notice of their appointment in the manner that the Court directs.

Question 3.4

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

Key protections of creditors in the new restructuring officer regime are as follows:

- an automatic stay takes effect as soon as a restructuring petition is presented to the court to prevent the continuation or commencement of any proceedings against the company without leave of the Court;
- a creditor may apply to the Court for a variation or a discharge of an order appointing the restructuring officers by way of summons in Form Number 16B of the Companies' Winding Up Rules. The company, restructuring officer or the Authority may also bring such an application under section 91E of the Companies Act; (1)
- a creditor may also apply to the Court for the removal and replacement of a restructuring officer by way of summons in Form Number 16C of the Companies' Winding Up Rules. If a restructuring officer is removed, they will be required to

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

Commented [BB18]: Question 3.4 - Sub-total = 3/6

Commented [jo19]: Protects the company, but you've not said anything as to how it positively safeguards creditors, something like it stops legal action and further expensive litigation thereby preserving value for creditors etc

report to the stakeholders of the company and to deliver all files relating to the company's restructuring to their successor; and (1)

- creditors with security over the whole or part of the assets of the company will remain entitled to enforce that security without the leave of the Court and without reference to the restructuring officer. (1)
- if a majority in number representing seventy-five per cent in value of the creditors or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, as the case may be, and also on the company.
- if seventy-five per cent in value of the members or class of members present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the members or class of members, as the case may be, and also on the company.

3 marks - additional considerations below

- The default position is that a Restructuring Petition will be heard on notice to stakeholders while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made *ex parte* by default. (1 mark)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint JPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (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)

As per section 91E of the Companies Act, the Court may, on hearing an application from (a) the company acting by its directors; (b) a restructuring officer; (c) a creditor (contingent or prospective included); (d) a contributory; or (e) the Authority (CIMA):

- vary the order appointing the restructuring officer; (1)
- discharge or continue the order appointing the restructuring officer; (1)
- adjourn the hearing conditionally or unconditionally; (1)
- dismiss the application; or (1)
- 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 sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

Upon the presentation of a restructuring petition, an automatic stay takes immediate effect to prevent the continuation or commencement of any proceedings against the company without leave of the Grand Court. All restructuring petitions should be heard within 21 days which enables companies to seek relief quickly and efficiently while also protecting creditors from debtor companies who may seek to use the statutory moratorium without progressing the substantive application or without a *bona fide* intention to restructure the company.

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

- make an order appointing a restructuring officer;
- adjourn the hearing conditionally or unconditionally;
- dismiss the petition; or
- make any other order as the Grand Court thinks fit except an order placing the company into official liquidation.

5 Marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / . . .

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

The operation of ELPs is principally governed by the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 revision) (the ELP Act). (1) The ELP Act provides that principles of Common Law and Equity applicable to partnerships also apply to an ELP. (1) As noted in the question, the operations of an ELP are also governed by the ELP's limited partnership agreement agreed between the general partner and limited partners - this sets out the respective rights and obligations of the general partner and limited partners.

The ELP Act provides a specific list of activities (known as "safe harbour" provisions) which may be undertaken by a limited partner without constituting "participation" in the conduct of the business of the ELP, including:

- presenting a winding up petition;
- approval of an amendment to the partnership agreement;
- acting as surety or guarantor for the ELP; and
- calling, requesting, attending, or participating in any meeting of the partners.

The liquidation and dissolution of ELPs is governed by Part V of the Companies Act and the Companies' Winding Up Rules; however, where there are inconsistencies, the ELP Act will take priority over the Companies Act.

There is debate in the Courts of the Cayman Islands over the appropriate procedure for presentation of a winding up petition in respect of an ELP, particularly whether it should be presented against the ELP directly or against the general partner of the ELP.

Question 4.2

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

Under section 91(d) of the Companies Act, the Cayman Islands Court has jurisdiction to wind up a foreign company that:

- has property located in the Cayman Islands;
- is carrying on business in the Cayman Islands;
- is the general partner of an ordinary limited partnership or an ELP; or
- is registered under Part IX of the Companies Act.

If a foreign company establishes a place of business or commences carrying on business within the Cayman Islands, the company must register in the Cayman Islands pursuant to

Commented [BB21]: Question 4.1 - Sub-total = 3/3

Commented [sp22]: Question 4.2 - Sub-total = 5/5

Part XI of the Companies Act.

In the recent decision in *the matter of Silicon Valley Bank (Cayman Islands Branch) FSD 163 of 2023 (DDJ)*, the Justice confirmed the Grand Court's jurisdiction to make a winding-up order in respect of a foreign company, which had been registered as a foreign company in Cayman since 2007 and continued to be registered at the time of the hearing. The Grand Court also accepted that the "Latreefers" test as applied in the English decision in *Re Drax Holdings Ltd 2004 W.L.R 1049* is applicable in the Cayman Islands which states that the Court should exercise its discretion to order the winding up of a foreign company if:

- there is a sufficient connection with the jurisdiction, which may consist of assets within the jurisdiction, (though it is not necessary);
- there is a reasonable possibility of benefit to applicants for the winding-up order if one is granted; and
- one or more persons interested in the distribution of the company's assets is or are persons over whom the court can exercise jurisdiction.

The Cayman Islands court also has jurisdiction to grant an application to foreign companies which have assets or business in the Cayman Islands under section 241 of the Companies Act for an order recognizing foreign representatives to act in the Cayman Islands on behalf of the foreign companies. Following this application, the foreign representative can then apply for injunctive relief and to bring further proceedings.

Question 4.3

Commented [sp23]: Question 4.3 - Sub-total = 0/3

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)

A judgment or order of a foreign court has no direct legal effect and is not enforceable in the Cayman Islands in and of itself and, as such, steps must be taken to legally enforce a foreign judgment in the Cayman Islands. Moreover, the Cayman Islands has not entered into any international treaties which institute the reciprocal recognition or enforcement of foreign judgments, such as the Hague Convention of 2 July 1919.

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides that foreign judgments given in specified foreign courts may be registered and enforced in the Cayman Islands in the same manner as a domestic judgment of the Cayman Islands court; however, the Act only applies to certain courts of Australia (and its external territories) as set out in the Foreign Judgments Reciprocal Enforcement (Australia and its External Territories Order) 1993.

The registration of a foreign judgment must be set aside if the Supreme Court is satisfied that the:

- judgment is not covered by the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) or was registered in contravention of the Act;

- foreign court had no jurisdiction in the circumstances of the case;
- defendant did not receive notice of the proceedings in the foreign jurisdiction in sufficient time to enable him to defend the proceedings and did not appear;
- judgment was obtained by fraud; or
- rights under the judgment are not vested in the person by whom the application for registration was made.

Foreign judgments from other jurisdictions which are not registrable under the Act (above) must be enforced by way of commencing a new action in the Cayman Islands on the basis that the foreign judgment is treated as evidence of a debt (or other obligation). A foreign money judgment will be recognized and enforced as a debt against the judgment debtor where:

- such judgment is final and conclusive in the foreign court;
- the judgment was obtained in a court of law which had jurisdiction over the judgment debtor;
- the judgment was not obtained by fraud;
- the judgment was not in respect of taxes, fines or penalties;
- the enforcement of the judgment would not contravene the public policy of the Cayman Islands; and
- the rules of natural justice were observed in the foreign proceedings.

The Grand Court can enter a foreign judgment on the same terms as a Cayman Islands domestic judgment if it:

- was given by a court of competent jurisdiction;
- is conclusive and final;
- is not fiscal/penal/contrary to public policy; and
- is enforced within the statutory limitation period (6 years) allotted for in the Cayman Islands.

Foreign judgments can be challenged in Court, and examples of grounds for these challenges are:

- the enforcement of the foreign judgment is contrary to public policy;
- the foreign court does not have jurisdiction;
- the defendant was not provided with sufficient notice of (or did not participate in) the foreign proceedings; or
- the judgment was fraudulently obtained.

Any action for the enforcement of a foreign judgment is a financial services proceeding which must be commenced in the FSD of the Court, commencement must be by originating summons pursuant to the Act (described above) or by a writ of summons (personal service is required) pursuant to Common Law, which sets out the cause of action and details of the claim. Once the judgment is served and the defendant responds, the claimant can apply for a default judgment or summary judgment.

However, a judgment in the case *Bandone* confirmed that the Cayman Islands courts will not enforce a foreign in rem judgment as it relates to Cayman Islands property.

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

Question 4.4

Commented [BB24]: Question 4.4 - Sub-total = 3/4

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 attached to the Court and administers the debtors' bankruptcy estate pursuant to the Bankruptcy Act. Upon the making of a provisional or absolute order, the debtor's property immediately passes to the Trustee.

The duty of the Trustee is to preserve the property so that it may be returned to the debtor in the condition in which it was seized, if the provisional order is revoked. (1) Once an absolute order has been made, the Trustee must proceed to administer the debtor's estate for the benefit of creditors. (½) section 65

If a deed of arrangement is properly entered into between a debtor and their creditors, the debtor must submit themselves to the public examination of the Court. In this scenario, it is the Trustee's duty to make a report to the Court under Section 67 of the Bankruptcy Act. Further, as soon as possible after the close of the public examination of the debtor, it is the Trustee's duty to make a report as to the state of the debtor's affairs and as to the debtor's conduct before and during bankruptcy. The Trustee must note any matters which might constitute offences under the Bankruptcy Act.

The powers of the Trustee are 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 business; (1) section 79
- the Trustee may bring or defend any legal proceedings relating to the debtor's property; and (1) section 80
- the Trustee must receive and adjudicate the proof of debts as set out in the Grand Court (Bankruptcy) Rules 2021.

Further, the Trustee has the power to appoint a proper person to act as his agent in respect of any estate vested in or administered by him under Section 13(1) of the Bankruptcy Act, or in respect of any part of the business thereof.

The Trustee's office must be in Grand Cayman as per Section 13(8) of the Bankruptcy Act.

For full marks to be awarded, in one of your examples, you must refer to the section of the Bankruptcy Act.

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****