



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 60/100

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

EXAMINERS

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

All candidates are expected to comply with ALL the instructions.

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Commented [BB2]: Question 1 - Sub-total = 17/20

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.

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

Question 1.11

Select the **incorrect** statement:

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

Question 1.12

Choose the **correct** statement:

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

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

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

Question 1.13

Select the **correct** statement:

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

Question 1.14

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

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

Commented [BB4]: 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.

Commented [BB5]: The correct answer is (b)

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)

[Assuming the liquidators are local to Cayman Islands, set out below are the requirements to be included on a consent to act:

Qualification - A statement to ensure that he is a qualified Insolvency Practitioner (1) by way of a) being a licensed insolvency practitioner in a relevant country or b) being qualified as a professional accountant by an approved institute, is in good standing, and is credited with not less than 2,500 chargeable hours of relevant work over a minimum of five years' relevant experience.

Residency - A statement to ensure that he complies with a) residing (1) in Cayman Islands b) be a partner or employee for a company which holds a trade and business licence which authorises that person or that person's firm to carry on business as professional insolvency practitioners.

Independence - A confirmation that the Liquidator has been independent (1) from Bluesea and he has not acted as auditor of Bluesea in the past 3 years immediately preceding the commencement of the liquidation.

Insurance - A confirmation that he or his firm has professional indemnity insurance (1) (up to a limit of at least USD10 million of each claim and at least USD20 million in aggregate with deductible of no more than USD1 million.

Appointments - A confirmation that he is willing and able to act as the official liquidator. (1)

Each of the above requirements are set out in Insolvency Practitioners' Regulation under Part II]

5 marks

Question 2.2

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

Commented [BB6]: Question 2.1 - Sub-total = 5/5

Commented [BB7]: Question 2.2 - Sub-total = 3/5

[Employees of Bodden & Ebanks cannot act as Liquidator primarily due to them acting as Auditors of Bluesea in 2021 (c.2 year prior to commencement of the liquidation). (1)

It should be made known to the court prior to the hearing of the winding up that Bodden & Ebanks have a conflict of interest and incorrectly signed their consents to act.

As stated in question 2.1, the independence requirement for the consent to act specifically states that the liquidator or liquidator's firm cannot have audited the company within a period of 3 years. (1)

It is also worth noting that the fact sheet states that Bluesea only has one complete audit which must have been completed by Bodden & Ebanks and they resigned shortly after which may require further investigation as to the circumstances around both a) one audit being complete, b) why Bodden & Ebanks Limited resigned from the audit. This cannot be done by Bodden & Ebanks as they are conflicted.

The proposed liquidators should notify the Court of the incorrect consent to act and advise the Court accordingly and thus retract their consent to act. (1)

]

3 marks - there's no specific reference to IPRs reg 6 in the answer above or setting out what the IPRs actually state re the independence requirements.

Question 2.3

Commented [BB8]: Question 2.3 - Sub-total = 3/5

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)

[As set out in the Companies Act s 120, there are no qualification requirements for Tom and Jerry to act as a voluntary liquidator. Any persons can be appointed 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)

[As set out in 123 (1) of the Companies Act, Within 28 days of their appointment, Tom and Jerry must:

- a) File notice of winding up with the Registrar;
- b) File the consent to act with the Registrar;
- c) If Cheese Limited carries out regulated business a notice of winding up must be serviced upon the Cayman Islands Monetary Authority;
- d) File the director's declaration of solvency with the registrar; and
- e) Publish notice of winding up in the Gazette. (2)

]

Question 2.3.3 (0/2 marks)

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

[As set out in Order 13, R9 of The Companies Winding up Rules 2008, the remuneration of Tom and Jerry must be authorized by a resolution of the company.

Tom and Jerry must present their account in the company's functional currency and include details of the amount of the remuneration.

In the event that the liquidation of Cheese Limited is greater than one year, Tom and Jerry must summon a general meeting of Cheese Limited at the end of year one from the 1 March 2023, and at each year thereafter for approving the remuneration up to the period of the interim accounts.

Once the affairs of Cheese Limited has been fully wound up, Tom and Jerry must organise a final meeting of Cheese Limited which includes the approval of the liquidator's remuneration]

The correct answer is :

- an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation; (0.5 marks)
- a fixed sum; (0.5 marks)

- a commission or percentage of the assets distributed or realised; or **(0.5 marks)**
- a combination of these methods. **(0.5 marks)**

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 set out in s95 (1) of the Companies Act, The Court has the power to:

Dismiss the petition;
 adjourn the hearing;
 make a provisional order; or
 make any other order the court deems fit.]

Question 2.5

Question 2.5.1 (3/4 marks)

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

[Section 107 of the Companies Act states that a creditor or contributory of the company can make an application order to the Court to remove an official liquidator.

In the case BTU Power Company, the court found that former directors of the Company do not have powers to remove the joint official liquidators.

The application by the creditor or contributory is called a "removal summons" and must be served on the following parties:

- The official liquidator
- Each member of the liquidation committee
- Counsel of the liquidation committee (if applicable)
- Any other contributory or creditor as the Court directs.

The removal summons must propose a new qualified liquidator who the Court could appoint to replace the removed liquidator. The proposed liquidator must swear an affidavit which complies with the Liquidator's Consent to Act as discussed in question 2.1 above.

The removed liquidator must be entitled to at least 14 days' notice of a removal summons.

Commented [BB9]: Question 2.4 - Sub-total = 2/2

Commented [BB10]: Question 2.5 - Sub-total = 5/9

Commented [ni11]: no reference to CWR O.5, r.6

The outgoing liquidator must:

- Deliver the replacement liquidator the company's books and records and liquidation file,
- Prepare a report and accounts within 28 days to allow unrestricted access to the company's books and records.

]

Question 2.5.2 (2/5 marks)

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

[The solvency of the company is important when reviewing the secured creditor position.

If the company is solvent, and not in negative equity on any secured investments, there is no movement in the waterfall of payments and therefore a sale of the underlying asset will pay the secured creditor out in full, with residual proceeds being put into the liquidation assets.

The issue arises when the company is insolvent, and in particular if the secured investment is in negative equity. This would result in the secured creditor not being paid out in full. They would receive the net value from the sale (less costs) and the residual amount owed to the creditor would become unsecured debt to the company and therefore move down the waterfall.

Secured creditors will always be paid out in first prior to any other class of applicant. This is due to the secured creditor being able to enforce on the asset.

To note it is also important to differentiate between a fixed and floating charge when the fund is insolvent due to preferred creditors ranking above secured creditors with a floating charge.

In relation to Preferential Creditors, if the liquidation is insolvent, there are debts owed by the company which take priority over all other debts. These include debts to employees employed in Cayman and elsewhere, bank depositors (in Cayman Islands) and taxes due to government. If the funds available in the liquidation is not sufficient, there above three payments will be equally proportioned.

]

Question 2.6

Commented [ni12]: This answer only displays a limited awareness of what is being asked.

As you state above, s.107 allows either a creditor or a contributory to apply to remove an OL.

This question asks why the potential class of application (i.e. a creditor OR a contributory) varies in accordance with company solvency. A correct answer would analyze when creditors have standing (when the company is insolvent), when contributories do (when solvent) and why.

The position of secured creditors is not really relevant to this answer. They are not a separate category of applicant under s.107.

Therefore I am awarding 1 mark (for mentioning BTU in your answer above) and 1 more mark, for a general indication that you broadly understand the liquidation waterfall, which is somewhat relevant to this question.

Commented [ca13]: Question 2.6 - Subtotal = 4/4.

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)

[As set out in Order 9, r1 of the Companies Winding Up Rules, if the company is insolvent, the liquidation committee must consist of between three and five creditors.

In a solvent liquidation, the liquidation committee must consist of three to five contributories.

As the liquidator settles the companies debts to each of the creditors, including the liquidation committee, the member of the liquidation committee's membership to the liquidation committee will automatically terminate if his claim has been paid in full.

As the liquidation repays the companies liabilities to creditors and the creditor's membership ceases, the liquidator can invite contributories to attend the liquidation committee. Once all the creditors are paid, the liquidator must have replaced the liquidation committee with three to five contributories of the company.]

Question 2.7

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

[As set out in order 22 r.2 of the Companies Winding Up Rules, following making the order for dissolution, the liquidator must:

- file the order for dissolution with the Registrar of Companies within 14 days of the order being complete,

The former liquidator must become trustee of any unclaimed dividends, and place all unclaimed dividends into an interest bearing bank account (naming of which can be found in order 23 r.2 of the Companies Winding Up Rules.

The following is set out in subsequent parts of the Order 23 of the Companies Winding Up Rules,

- Transfer of Undistributed assets – The former liquidator must hold any undistributed assets as a trustee for the benefit of the creditors or contributories who are entitle to such assets,

Commented [ca14]: Question 2.7 Subtotal 2/5 two marks awarded for referencing the filing of the dissolution order and dealing with unclaimed dividends.

The former liquidator must advertise for claims and take such steps to reasonable locate and identify claimants.

One year post company dissolution, the former liquidator shall transfer all remaining assets and or moneys to the Financial Secretary who shall be responsible for administering such pursuant to Part VIII of the Public Management and Financial Law.

The former liquidator must prepare a final report and accounts of his administrations (contents of same can be found in Order 23 r.6 of the Companies Winding Up Rules. This report must be delivered to the Financial Secretary along with all the books and records.

Question 2.8

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

[Pursuant to Section 102 of the Companies Act which allows the liquidator to investigate:

- a) If the company has failed, the cause of the failures, (1)
- b) Generally the dealings and affairs of the company.

In a provisional liquidation, the court may require more specific aspects of the company's affairs for the liquidator to investigate

Subject to Court direction, the liquidator shall have powers to

- a) Assist the Police Service and Authority to investigate conduct of (½)
 - a. Directors or officers of the company,
 - b. Professional service providers of the company
 - c. Employees of the company (past or present who have worked in the company for the 12 months preceding the winding up order) (1)

In effect, the liquidator has the power and duties to investigate the affairs of the company which has resulted in the winding up proceedings, and any further aspects of the company which the Court has requested.]

More detail would have improved the mark awarded. In your answer refer to case law and legislation. Ensure your answers are commensurate with the mark allocation. See model answer below:

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

Commented [BB15]: Question 2.8 - Sub total = 2.5/5

himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the courts of his investigation, which is material to ascertain the exact truth in every case before the Court". (1 mark) In addition to this general duty, section 102(1) of the Companies Act expressly empowers the liquidator to investigate (a) if the company has failed, the causes of the failure; and (b) generally the promotion, business, dealings and affairs of the company, and to make such report if any to the court as the liquidator thinks fit (1 mark). Additionally, the liquidator is also empowered (subject to obtaining directions from the court) to assist the CIMA and the RCIPS to investigate the conduct of persons, and institute and conduct a criminal prosecution of person referred to in section 101(3) of the Act. Those persons include existing or former directors or officers of the company; (b) professional service providers to the company; and (c) employees of the company, during the period of one year immediately preceding the relevant date. (2 marks)

Question 2.9

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

[Section 101 of the Companies Act refers to the statement of affairs of the Company.

The meaning of relevant date refers to the criteria of which the persons who the liquidator may require to prepare and submit person statements in the prescribed form as to the affairs of the company.

To determine who the persons the liquidator can lean on is defined in 101(3) of the Companies Act. The persons the "relevant date" relate to are employees of the company.

The Liquidator can only call upon employees (current or former) who have worked in the period of one year immediately preceding the "relevant date".

The relevant date is defined as:

- a) The appointment date of the provisional liquidator; or
- b) Commencement of the winding up of the company. (1)

This means that the Liquidator can request a statement of affairs from any employee who has worked with the company for 12 months prior to the "relevant date" which means although an employee may no longer work for the Company, they can still be called upon to provide a persons statement in the liquidation.

]

Your answer focused on the persons rather than explaining the meaning of the "relevant date"

Commented [BB16]: Question 2.9 = Sub-total = 1/5

The suggested answer to this question is:

In the context of an official liquidation (noting that this section also applies to provisional liquidators), the relevant date for the purposes of section 101 means the commencement of the winding up. **(1 mark)** In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)). **(1 mark)** However, this is subject to section 100(1), which provides that the commencement of the winding up may be an earlier date if, before the presentation of a petition for the winding up of a company by the court, a resolution was passed by the company for voluntary winding up; any period fixed for the duration of the company by the articles of association has expired; an event giving rise to a requirement to wind up the company in the articles of association has occurred; or a restructuring officer has been appointed. **(2 marks)** If any of these events occur then the winding up is deemed to have commenced at the time of the relevant aforementioned event. **(1 mark)**

**** 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 [BB17]: Question 3.1 - Sub-total = 1/5

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

[As set out in Part II, regulation 5 of the Insolvency Practitioner's Regulations, there is a minimum requirement for an insolvency Practitioner to hold (directly or by the firm) professional indemnity insurance up to a limit of no less than USD10 million in respect of each and every claim.

Commented [jo18]: It's regulation 7

In the current state, the provisional liquidator must increase the professional indemnity insurance otherwise he will be unable to sign the consent to act therefore, unable to satisfy the insurance regulations and unable to be appointed provisional liquidator. (1)

However, as TCS is seeking the winding up order, and if they are adamant to have the chosen provisional liquidator appointed, they could in theory come to an agreement that the additional insurance could be paid by another entity. The legislation only indicates that the insolvency practitioner must have professional indemnity insurance (up to a limit of at least USD10 million) it doesn't specifically state who needs to pay for the policy.

In the background there could be an agreement for an offset of distributions from the company or otherwise to cover the increased premium which would in turn allow the chosen provisional liquidator to have the professional indemnity insurance in place and therefore sign the consent to act form.]

1 mark - suggested answer below

The chosen provisional liquidator of SMB by contributories is based in Hong Kong and would therefore be deemed a foreign practitioner. (1 mark)

Foreign practitioners are permitted to be appointed as official liquidators, but they must be appointed jointly with a qualified insolvency practitioner per section 106 (1) of the Companies Act (2023 as revised). (1 mark)

In addition, the Insolvency Practitioners Regulations (IPRs), in particular regulation 8 states that

"A foreign practitioner who meets the independence and insurance requirements of Regulations 6 and 7 of the IPRs 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). A foreign practitioner need not meet the residency requirement of Regulation 5." (1 mark)

The insurance requirements contained within regulation 7 of the IPRs states (amongst other things)

"A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless he and the firm of which he is a partner or employee or the company of which he is 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\$100,000) applicable to the negligent

performance or non-performance of his duties as an official liquidator generally. (emphasis added). (1 mark)

Therefore, if the chosen liquidator by the contributories of SMB isn't prepared to or cannot increase his professional indemnity insurance from US\$5 million per each and every claim to US\$10 million per each and every claim – then he would be unable to act as an official liquidator. (1 mark)

Question 3.2

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

[As set out in 91B of the Companies (Amendment) Act, 2021, the company must present a petition to the Court for the appointment of a restructuring officer and outline the following:

- a) Unlikely to pay its debts of sum exceeding KYD100 (1)
- b) Intends to present an arrangement or compromise to its creditors by way of consensual restructuring or pursuant to the companies act. (1)

2 marks

Question 3.3

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

[Unless ordered from the Court the restructuring petition must be presented in accordance with Form Number 3A of the CWR and:

- Once in a circulated newspaper in the Cayman Islands (1/2)
- Once in a circulated newspaper in the countries (or country) which is most likely to gain the attention of the creditors/contributories. (1/2)

To improve your response you must provide the time frame for such advertising requirements 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 [BB19]: Question 3.2 - Sub-total = 2/2

Commented [BB20]: Question 3.3 - Sub-total = 1/2

Commented [BB21]: Question 3.4 - Sub-total = 3/6

[Pursuant to the Companies (Amendment) Act, set out below are six elements of which the restructuring officer regime can assist in safeguarding the interest of the creditors:

1. **Perception of the regime** - as the new regime does not have the title liquidation, there may be more perceived change of which the company can come out and therefore will benefit the interests of the creditors. The Provisional Liquidation (which is a similar regime) has the nuance of "Liquidation" in same. This to the unknowing company, would indicate that the company is currently in winddown which may not be the case. The new title Restructuring Officer Regime allows for more optimism in the market and therefore the company may be able to more willingly operate on a going concern basis which in turn will benefit the creditors. (1)
2. **Appeal of the regime** - Should the creditors oppose the regime; they have the ability to petition to the court for a variation or a discharge to the appointment of the restructuring officer by way of summons in Form Number 16B of the CWR. This allows the creditor have power to voice their concern which in turn safeguards the interest of the creditor. (1)
3. **Appeal the restructuring officer** - Should the creditor oppose the individual or firm of which the restructuring officer works, the creditor (or contributory) has the ability to apply to the court for the removal or replacement of the restructuring officer. This ensures that the creditors are in agreement with the individual taking up the restructuring.
4. **Secured Creditor abilities** - The regime allows for creditors with security over part or all of the assets of the company, to continue their ability to enforce on its security without leave from the court or reference to the restructuring office. This ensures that secured creditors still have the ability to exercise their rights under previous agreements. (1)
5. **Winding up petition** - the regime still allows for creditors to petition a winding up petition to the court during the restructuring regime. It will be at the court's discretion to approve the winding up order, however, the possibility is still available to the creditor
6. **Rights on value of claim** - the regime needs approval from 75% of the class of creditors. this means the majority (by value) of creditors need to be in agreement to approve the scheme. This ensures the interest of 75% of creditors have a voice in the regime.]

3 marks - suggested additional points 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 IPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)

- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (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

Commented [BB22]: Question 3.5 - Sub-total = 0/5

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

[I will assume the question is meant the relief available to the Court to give to the Company upon a restructuring petition.

The Court does not need to give relief to the company in relation to proceedings made against or will be made against the company. Once the restructuring petition is filed with the Court, no proceeding can proceed or commence against the company. Any creditor or contributory can apply for leave from the court to engage with proceeding against the company and therefore is relief which is available from the Court.

As the freeze on proceedings is immediate upon filing and not upon an order from the court, there will be a delay in any proceedings due to the temporary freeze is outside the courts control unless a creditor or contributory engages and requests leave from the court.

The court must hear the within 21 days of the presentation of the petition. This is to allow relief to the company to have a quick and efficient way to protect the stakeholders in the company.

This will also give the company relief in respect of any potential winding up proceedings.
]

0 marks - the question is seeking what the Court can or cannot do when considering a restructuring petition in front of it. Below is the answer that would have got the marks.

Upon the hearing of a Restructuring Petition the Grand Court may: (i) make an order appointing a restructuring officer (1 mark); (ii) adjourn the hearing conditionally or unconditionally (1 mark); (iii) dismiss the petition (1 mark); or (iv) make any other order as the Grand Court thinks fit (1 mark) except an order placing the company into official liquidation (1 mark).

**** 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 Exempted Limited Partnership ("ELP") act also governs the operations of ELPs. (½)
What year is the act? - see model answer below.

The operation of an ELP is governed by the general partners and not the limited partners.

If the Registrar has reasonable cause to believe that the ELP is no longer operating, they can strike the ELP off the registrar.

The Exempted Limited Partnership Act (2021 Revision) (1 mark) and the principles of common law and equity applicable to partnerships (1 mark) as modified by the Partnership Act (2013 Revision). (1 mark)

Commented [BB23]: Question 4.1 - Sub-total = 0.5/3

Question 4.2

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

[Pursuant to section 91(d) of the companies act, the Cayman Islands courts have jurisdiction to wind up a foreign company that:

- Holds property located in Cayman Islands;
- Carries out business in Cayman Islands;
- Is a general partner of a limited partnership
- Is registered under part IX which requires a foreign company to register in the Cayman Islands where it commences carrying out business in Cayman or establishes a place of business in Cayman Islands after the 1st December 1961.

]

Commented [sp24]: Question 4.2 - Sub-total = 5/5

Question 4.3

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

[A judgment of a foreign court has no direct legal effect in the Cayman Islands and is not

Commented [sp25]: Question 4.3 - Sub-total = 0/3

enforceable in the Cayman Islands in itself. Steps need to be taken to have foreign court decisions enforceable in the Cayman Islands.

This is because the Cayman Islands are currently not engaged in any international treaties which would agree a common enforcement.

To have foreign court judgements stand in the Cayman Islands, it must be dealt with in the same manner as domestic judgements in the Cayman Islands by appearing in front of the Court and the judge opining on same.]

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 [BB26]: 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)

[Set out in Part III - Trustee in Bankruptcy in Bankruptcy Law defines the trustee in bankruptcy as some who shall be attached to the Court and shall administer the estate of debtors in the bankruptcy subject to the Bankruptcy laws.

Until the bankruptcy is made absolute, the Trustee must preserve the property so that it can be returned to the debtor should the bankruptcy order be revoked. (½)

The Trustee may:

- Carry the trade of the company on as much as necessary or wind up/sell the business. (1) section 79
- Engage in legal proceedings relating to the property of the debtor, including bring forward claims and defend same. (1) section 80
- Receive and adjudicate proof of debts from creditors. (½) section 87
- Make a report as soon as possible after the clos of the public examination of the debtor as to the affairs of the debtor before and during the bankruptcy.

For full marks you must provide the reference to the section of the Bankruptcy Act to which you referred (in one example).

]

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****