



INSOL
INTERNATIONAL



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

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.

Commented [BB1]: TOTAL = 75.5/100 Very well done!

Commented [BB2R1]: Mark adjusted upwards to 76/100

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Questions 1.1 - 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

Question 1.1

What is the date for Financial Institutions to submit its common reporting standard (CRS) Return in respect of reportable accounts?

- (a) 1 January (annually)
- (b) 1 April (annually)
- (c) 1 July (annually)
- (d) 1 October (annually)

Question 1.2

What is the maximum success fee permitted pursuant to Conditional fee agreements?

- (a) 50%
- (b) 33.33%
- (c) 66.66%
- (d) 100%

Question 1.3

Choose the **correct** statement:

How many forms of security interests are recognised in the Cayman Islands?

- (a) 3

Commented [BB3]: Question 1 -Sub-total = 19/20

(b) 5

(c) 6

(d) None of the above

Question 1.4

Who may **not** petition for the winding up of a Company?

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

What is the minimum sum required to be owed, to enable a statutory demand to be used?

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

A Restructuring Officer is required to report to the Court following their appointment:

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

(c) At such intervals as the Restructuring Officer considers appropriate.

- (d) Within 7 days of the appointment.

Question 1.7

Which of the following is **not** required to be included in an affidavit filed in support of a restructuring petition:

- (a) A statement that, having made due enquiry and taken appropriate advice, the board believes that the company is or is likely to become unable to pay its debts.
- (b) An explanation of how the company will be funded during the restructuring period.
- (c) A statement as to why the directors believe that the appointment of a restructuring officer will be in the bests interest of the company.
- (d) A detailed outline of the proposed restructuring plan.

Question 1.8

Choose the **correct** statement:

A petition for the appointment of a Restructuring Officer can be brought by:

- (a) the company.
- (b) any creditor;
- (c) any contributory; or
- (d) all of the above

Question 1.9

Choose the **correct** statement:

Unless the Court otherwise directs, when must the petition for the appointment of a Restructuring Officer be heard?

- (a) within 14 days of the petition being filed.
- (b) within 21 days of the petition being filed.
- (c) within 28 days of the petition being filed.
- (d) within 56 days of the petition being filed.

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

- (a) can be sanctioned by the Court with the consent of all affected parties.
- (b) requires a special resolution in accordance with the company's Articles.
- (c) can only proceed if there are shareholders / creditors who may not agree with it
- (d) Only needs to be approved by a majority in value.

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.

Commented [BB4]: The correct answer is (d)

Question 1.13

Select the **correct** statement:

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

Question 1.14

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

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

Question 1.15

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

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

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

Question 1.16

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

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

Question 1.17

Select the **correct** statement:

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

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

Question 1.18

Choose the **correct** statement:

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

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

Question 1.19

Select the **correct** statement:

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

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

Question 1.20

Select the **correct** statement:

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

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

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

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

Question 2.1

As part of Whitesand's petition to wind up Bluesea, Whitesand obtained sworn consent(s) to act from the proposed official liquidators. Set out the required content of the consent to act signed by the proposed official liquidator(s). (5)

Order 3, Rule 4 of the Companies Winding Up Rules (2023 Consolidation) ("CWR") sets out the requirements for the nominated official liquidator's consent to act.

For the purposes of this question, it is assumed that the proposed official liquidator resides in the Cayman Islands.

On this basis, CWR, O.3 r.4(1) requires that Whitesand's winding up petition be accompanied by an affidavit sworn by the proposed official liquidator, stating: (1)

- That the proposed official liquidator is a qualified insolvency practitioner and meets the residency requirements set out in regulation 5 of the Insolvency Practitioners' Regulations ("Regulations"). Regulation 5 of the Regulations states that the practitioner must be resident in the Cayman Islands and that the firm they are employed by holds a trade and business license authorizing them/their firm to carry out work as an insolvency professional. (1)
- The country in which the proposed official liquidator is qualified to perform the functions equivalent to that of an official liquidator.
- The proposed official liquidator's professional experience.
- That the proposed official liquidator will have the benefit of professional indemnity insurance that meets the requirements of regulation 7 of the Regulations. In particular regulation 7 of the Regulations requires that professional indemnity insurance shall be up to a limit of USD10m (for each and every claim) and at least USD20m in aggregate. (1)
- The proposed official liquidator meets the independence requirements contained in regulation 6 of the Regulations. The independence requirements under regulation 6 of the Regulations are such that an insolvency practitioner (either themselves or their firm) cannot have been engaged as the company's auditor within the three years immediately preceding the commencement of the liquidation. (1)

4 marks - point missed was "he is willing to act as official liquidator, if so appointed by the Court"

Question 2.2

Commented [BB5]: Question 2.1 - Sub-total = 4/5

Commented [BB6]: Question 2.2- Sub-total = 2/5

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

As the proposed liquidators have already provided their consent to act it is assumed that the winding up petition has been presented. In the absence of the events outlined in section 100(1) of the Companies Act having occurred and in accordance with section 100(2) of the Companies Act (which states that the winding up of a company commences on presentation of the winding up petition), the winding up of Bluesea had commenced by the time the information concerning past audit work came to light.

As stated above, regulation 6 of the Regulations specifies the independence requirements for insolvency practitioners and states that an insolvency practitioner cannot be regarded as independent if either they or the firm they are employed by, has acted as the company's auditor within the three years immediately preceding the commencement of the liquidation. (1)

Given the winding up petition was presented in or around May 2023 and the audit work was performed in 2021, the audit work was performed within the three years immediately preceding the commencement of the liquidation. The proposed liquidators would therefore appear to be in breach of the independence requirements and should not proceed with the appointment. (1)

As stated above, the winding up has already commenced and therefore the proposed liquidators should resign. The requirements for resignation of official liquidators are set out in CWR O.5, r.4, and CWR O.5, r.4(1) requires that the official liquidators:

- Prepare a report and accounts (in accordance with CWR, O.10, r.2);
- Give notice of their resignation to the liquidation committee; and
- Apply to the Court for an order that they be released from their duties as official liquidator.

2 marks

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, 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 in May 2023, the proposed liquidators have acted as auditors within the 3 years immediately preceding the commencement of the liquidation, given Dodden & 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 recorded as a matter of urgency. (1 mark)

Question 2.3

Commented [BB7]: Question 2.3 - Sub-total = 5/5

Tom and Jerry have been appointed as joint voluntary liquidators of Cheese Limited, a Cayman Islands exempted company, upon the passing of a special resolution of the shareholders of Cheese Limited, dated 1 March 2023.

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

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

Section 120 of the Companies Act states that any person may be appointed as voluntary liquidator. Therefore Tom and Jerry do not need any qualifications to act as voluntary liquidators. (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 voluntary liquidators, pursuant to section 123(1) of the Companies Act, Tom and Jerry

must provide notice of the voluntary winding up as follows:

- File notice of winding up with the Registrar of Companies ("**ROC**") (in the form of CWR Form 19).
- File the liquidator's consent to act with the ROC (in the form of CWR Form 20).
- If obtained from the directors, file the Declaration of solvency with the ROC (in the form of CWR Form 21).
- It is assumed that Cheese Limited has been carrying on a regulated business, so Tom and Jerry will need to provide notice of their appointment to CIMA (which must include the ROC-endorsed CWR Forms 19 and 20).
- Advertise their appointment and provide notice of the winding up in the Cayman Islands Gazette. (2)

Question 2.3.3 (2/2 marks)

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

Tom and Jerry's remuneration must be authorized by a resolution of the shareholders of Cheese Limited, pursuant to CWR, O.13, r.9(1).

CWR, O.13, r.9(2) provides that the basis of Tom and Jerry's remuneration can be according to:

- (a) Hourly rates;
- (b) A fixed sum;
- (c) A commission or percentage of assets distributed or realized; or
- (d) A combination of the above. (2)

Question 2.4 (0.5/2 marks)

Assuming that the contributories petition the Grand Court of the Cayman Islands for an appointment of a provisional liquidator, what are the Court's powers upon the hearing of a winding-up petition? (2)

Pursuant to section 104(1) of the Companies Act, the Court may appoint a provisional liquidator after the presentation of a winding up petition but before the making of a winding up order.

Commented [BB8]: Question 2.4 - Sub-total = 0.5/2

Commented [ni9]: this question asks what the Court's powers are 'upon the hearing of a **winding up petition**' not upon the hearing of a PL application. Therefore you have not answered the question correctly I'm afraid. I am giving you 0.5 marks for what would have been a correct answer to the question "what would have been the court's powers upon the hearing of a PL application?"

Pursuant to section 104(4) of the Companies act, the Court has the power to confer on/limit the powers of the provisional liquidator and section 104(5) of the Companies Act provides that the Court shall fix the provisional liquidator's remuneration.

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)

Section 107 of the Companies Act provides that an official liquidator may be removed upon application by a creditor or contributory.

Whom has standing to apply to the Court for removal of an official liquidator will depend on the company's solvency.

In the case of an insolvent liquidation, only creditors may apply for the removal of an official liquidator, pursuant to the decision of *Johnson and Deloitte & Touche AG* [1997 CILR 120].

In a solvent liquidation, either a creditor or contributory may apply to the Court for removal of an official liquidator.

Case law provides some guidance on the circumstances in which an official liquidator may be removed, in particular the decision of *BTU Power Company 2019 (1) CILR Note 7* and *Johnson v. Deloitte & Touche A.G.* [1999 CILR 297] - for example, impropriety of the official liquidator and where it would be advantageous to interested parties in the liquidation.

Pursuant to CWR, O.5, r.6(1), application for removal of an official liquidator by a creditor or contributory is by way of a Removal Summons. CWR O.5, r.6(2) states that a removal summons is to be served on:

- the official liquidator (pursuant to CWR, O.5, r.6(5) the official liquidator is entitled to 14 days' notice of the Removal Summons).
- each member of the liquidation committee and counsel for the liquidation committee (if applicable).
- other creditors or contributories as directed by the Court.

Question 2.5.2 (4/5 marks)

Commented [BB10]: Question 2.5 - Sub-total = 8/9

Commented [ni11]: incorrect. In a solvent liquidation a creditor would have no financial interest & therefore no standing

Commented [ni12]: good answer, but because of the incorrect analysis above (which relates more to this question than 2.5.1.) I am only awarding 4 out of 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 is logical that only creditors have standing to apply for the removal of an official liquidator in an insolvent liquidation, as contributories are unlikely to have a "legitimate interest" in who the official liquidator is - given they are unlikely to participate in the distribution of the assets of an insolvent liquidation. This principle was set out in the decision of *Johnson v. Deloitte & Touche A.G.* [1999 CILR 297]. Conversely, in a solvent liquidation, the contributories will have an interest in the distribution of assets and therefore, have a legitimate interest in who the official liquidator is.

Question 2.6

During a liquidation there is an expected recovery into the liquidation estate. The amount is such that the liquidation estate is no longer deemed to be insolvent and the official liquidator can settle all of the outstanding creditor claims (including interest) in full. The official liquidator has subsequently filed a revised certificate of solvency (CWR Form No 14) with the court. What impact will the change in solvency have on the liquidation committee, assuming one has been constituted? (4)

Assuming a liquidation committee was formed previously in circumstances where the company was deemed insolvent or of doubtful solvency, the composition of the liquidation committee will change.

It is assumed that as contemplated by CWR, O.9, r. 3(1), the official liquidator's certification of the company's solvency has changed, such that the liquidator now certifies that the company is solvent.

Following this, in accordance with CWR O.9, r.3(2), the membership of any creditor members of the liquidation committee will cease automatically. The official liquidator must then convene a meeting of contributories for the purpose of electing new members to the liquidation committee.

In accordance with CWR, O.9, r. 1(2) the liquidation committee would need to comprise of no less than three but no more than five contributories.

Question 2.7

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

Commented [ca13]: Question 2.6 Subtotal - 4/4 concise well done

Commented [ca14]: Question 2.7 Subtotal 4/5 to receive a perfect mark needed to reference

"Following the dissolution of a company, the liquidator shall retain the liquidation files in safe custody for at least 3 years pursuant to O.26, r.2(3) of the CWR"

The making of an order for dissolution implies an order made under section 152(1) of the Companies Act in an official liquidation (as opposed to a voluntary winding up whereby the company is dissolved following the filing of a Final Return).

Under section 152(4) the official liquidator has 14 days to file the order for dissolution with the Registrar of Companies. Upon the dissolution of the company the official liquidator's duties cease, however they still have a duty to:

- a) maintain the safe custody of the company's books and records, in accordance with CWR, O.26, r.3, until they are able to dispose of them, in accordance with the order of the Court.
- b) Deal with the unclaimed dividends and assets of the company.

In relation to (b) above, the liquidator by virtue of section 153 of the Companies Act and CWR, O. 23, r.1, shall do so as trustee of any unclaimed dividends or undistributed assets. The title to any such assets transfers to the former liquidator in their own name and in their capacity "as trustee of the creditors or members of [the company]" pursuant to CWR, O.23, r.3(1). In accordance with CWR O. 23, r.2, the Liquidator shall establish a trust account and transfer the applicable funds to that account. CWR O.23, r.4(1) requires the former liquidator to advertise for claims and take other steps reasonably required to locate and identify the proper claimants and to this end, they will be required to adjudicate any claims and pay dividends, pursuant to CWR, O.23, r.4(1) and (2).

After the period of one year after the dissolution, any remaining unclaimed dividends/undistributed assets shall be transferred by the former liquidator, to the "Minister charged with responsibility for finance" pursuant to section 153(2) of the Companies Act.

Question 2.8

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

The extent of a liquidator's investigative powers and duties will depend on whether they are appointed as an official liquidator or a provisional liquidator.

A provisional liquidator's investigative powers are somewhat limited in comparison to an official liquidator. The provisional liquidator's powers may be limited by order of the Court pursuant to section 104(4) of the Companies Act, but does include requiring relevant persons to furnish a Statement of Affairs under section 101 of the Companies Act. Those persons are stated in section 103(3) of the Companies Act as persons who are or have been directors or officers, professional service providers or employees in the period of one year "immediately preceding the relevant date".

Commented [BB15]: Question 2.8 - Sub-total = 2/5

The official liquidator's powers are much broader. Where a winding up order is made, an official liquidator by virtue of section 102(1) of the Companies Act, is empowered to investigate the causes of a company's failure and "generally, the promotion, business, dealings and affairs of the company". (1) Under section 102(2) of the Companies Act, the official liquidator, subject to order of the Court, also has power to assist the RCIPS and bring criminal proceedings. (1)

An official liquidator, as for a provisional liquidator, has the power to require relevant persons to furnish a Statement of Affairs under section 101 of the Companies Act, as described above. By application to the Court and by order of the Court under section 103 of the Companies Act, an official liquidator may also obtain an order for the delivery up of the company's property or documents (section 103(3)(b) of the Companies Act) from a "relevant person" as defined by section 103(1) of the Companies Act; or for an examination of a relevant person (section 103(3)(a) of the Companies Act). An examination under section 103(3)(a) of the Companies Act may include an order that the relevant person swear an affidavit in response to written questions and/or attend an oral exam. By virtue of section 103(7) of the Companies Act, the Court can also make these orders in respect of a relevant person resident outside the Cayman Islands.

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 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)

The "relevant date" is defined by section 101(6) of the Companies Act as either:

Commented [BB16]: Question 2.9 - Sub-Total = 4/5

(a) the date of appointment of provisional liquidators in the case of a provisional liquidation; or

(b) on “the commencement of winding up” in the case of an official liquidation. **(1)**
In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)).

In relation to part (b) above, section 100 of the Companies Act sets out when a winding up by the Court commences. Section 100(1) of the Companies Act provides that the winding up is deemed to have commenced at the time of the following:

- a) passing of a resolution to put the company into voluntary liquidation; **(1)**
- b) the expiry of the period fixed for the duration of the company by its articles; **(1)**
- c) an event has occurred which under the company’s articles requires that the company be wound up; or
- d) a restructuring officer is appointed under sections 91B or 91C of the Companies Act and they have not yet been discharged. **(1)**

In any other event the winding up, and therefore the “relevant date” for the purposes of section 101 of the Companies Act, occurs on the presentation of a winding up petition.

**** 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 = 4/5

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

A provisional liquidator is required to file a consent to act in accordance with CWR O.3, r.4 (save that reference to "official liquidator" in that section is replaced by "provisional liquidator").

That consent to act requires that the provisional liquidator provide a sworn affidavit attesting to matters including insurance requirements. In the case of a foreign practitioner (1), this is governed by CWR O.3, r.4(2)(d) which requires that practitioner to meet the requirements of regulation 7 of the Regulations - such that the practitioner or the firm they are employed by has professional indemnity insurance up to a limit of at least USD10m in respect of each and every claim and at least USD20m in aggregate. (1)

We are told that the chosen provisional liquidator is based in Hong Kong and therefore, he must file a sworn affidavit in accordance with CWR O.3, r.4(2) for a foreign practitioner. As the chosen practitioner's professional indemnity liability insurance covers him only up to USD5m in respect of each and every claim, he does not comply with the insurance requirements under regulation 7(1) of the Regulations and CWR O.3, r.4(2)(d). (1)

However it may be open to the Court to make an order under regulation 7(2) of the Regulations that the practitioner procure professional indemnity insurance up to the required limit whereby the premium shall be paid out of the assets of the Company. Therefore the Court could still appoint the chosen provisional liquidator, subject to regulation 7 of the Regulations. (1)

4 marks - a comment referring back to the chosen IP saying he's unwilling to take out extra coverage and therefore he wouldn't be permitted to act would have also been acceptable.

Question 3.2

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

The company pursuant to section 91B(1) of the Companies Act, must demonstrate that:

- a) the company is or is likely to become unable to pay its debts (as defined by section 93 of the Companies Act, which lists the circumstances where a statutory demand has been served on the company by a creditor, the execution of other Court-ordered process in favour of a creditor, or where the Court is satisfied that the company cannot pay its debts); and (1)
- b) the company "*intends to present a compromise or arrangement to its creditors (or classes thereof)*" under the Companies Act, the law of another country or a "*consensual restructuring*". (2)

Commented [BB18]: Question 3.2 - Sub-total = 2/2

2 marks

Question 3.3

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

The advertising requirements are set out under CWR O.1A, r. 1 which states that:

- the petition for the appointment of a restructuring officer "*shall be advertised once in a newspaper having circulation in the Islands*": CWR O,1A, r. 1(3). (½)
- If the company is carrying on business in another country, the petition shall be advertised once in a newspaper having circulation in a country where "*it is most likely to come to the attention of the company's creditors...and contributories*" and it must be published in that country('s) official language: CWR O,1A, r. 1(4). (½)
- The advertisement must appear not more than seven business days after the petition is filed in the Court (½) and not less than seven business days before the Hearing: (½) CWR O,1A, r. 1(5)

The advertisement must be in the form of CWR Form 3A: CWR, O.1A, r.1(3).

Question 3.4

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

- a) Creditors have standing to apply by way of summons to the court, for a variation or discharge of the order appointing a restructuring officer: Companies Act, s 91E(1). (1)
- b) Creditors have standing to apply to the Court for the removal of a restructuring officer and appointment of an alternative restructuring officer: Companies Act, s 91F(1). (1)
- c) Secured creditors are still entitled to enforce their security, notwithstanding the appointment of a restructuring officer or the presentation of a petition for such appointment: Companies Act, s91H. (1)
- d) There is a stay of proceedings after the presentation of a petition for the appointment of a restructuring officer, such that other action or a winding up of the company may not proceed (except with the leave of the Court): Companies Act, s 91G.

Commented [BB19]: Question 3.3 - Sub-total = 2/2

Commented [BB20]: Question 3.4 - Sub-total = 5/6

Commented [jo21]: We're looking for a comment as to how this specifically benefits creditors as opposed to the Company

- e) It is open to a creditor to obtain the leave of the Court to bring proceedings, pursuant to section 91G(1).
- f) The restructuring officer must report to creditors within 28 days of their appointment, pursuant to CWR, O.1A, r.8(1). The content of the report, pursuant to CWR, O.1A, r. 8(2) must set out: (1)
- i. Steps taken and further steps intended to be taken under the restructuring.
 - ii. The company's financial position.
 - iii. Other information relevant to the company's affairs, financial position and proposed restructuring.
 - iv. Any other matters the Court may direct.

The requirement to report to creditors serves to ensure the restructuring officer is accountable to creditors. (1)

5 marks - other considerations

- 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)

Question 3.5

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

Under section 91E(3)(e) of the Companies Act, the only relief not available to the Court is placing the company into official liquidation. (1)

For a company to be placed into official liquidation this would be in circumstances where a winding up petition was presented but not withdrawn or dismissed, as contemplated by section 91G(1). This is assuming that the winding up petition has been made in accordance with section 94 of the Companies Act and in the circumstances set out under section 92 of the Companies Act. Should this be the case, the Court could make the orders available to it under section 95 of the Companies Act.

Commented [BB22]: Question 3.5 - Sub-total = 1/5

1 mark - the question asks what relief is and is not available, the candidate has only commented on the relief not available unfortunately. Suggested answer below.

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 Partnership Act (2013 Revision) and the Exempted Limited Partnership Act (2021 Revision). (1) 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 = 1/3

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 Court has jurisdiction to wind up a foreign company where that company:

- “...
(a) has property located in the Islands;
(b) is carrying on business in the Islands;
(c) is the general partner of a limited partnership; or
(d) is registered under Part IX.”

Part IX of the Companies Act by virtue of section 183 defines a foreign company as an overseas company which “establishes a place of business or commences carrying on a business...within the Islands”.

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)

Yes.

In the case of the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) which applies only to decisions of Australian Courts, a new matter will need to be brought in the Cayman Islands, to register and enforce that judgment.

Judgments of courts in other jurisdictions will be subject to the common law rules which

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

also require that any action must be brought as a new matter in the Cayman Islands, to form evidence of a debt, which may give rise to a winding up petition.

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

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)

A trustee is responsible to the Court and has a duty to administer a debtor's estate for the benefit of the debtor's creditors. (1)

The trustee's duties and powers include:

- Reporting to and accounting to the Court: Bankruptcy Law, s 95.
- Adjudicating proof of debts: Bankruptcy Law, s 87. (1)
- Taking possession of all the debtor's property, books and records: Bankruptcy Law, s 75. (1)
- Convening Meetings of Creditors: Bankruptcy Law, s 41.

An example of how the trustee exercises his/her powers in furtherance of their duties under the Bankruptcy Law is by virtue of section 78 of the Bankruptcy Law which empowers the trustee to sell the debtor's divisible property, for the benefit of creditors of the bankruptcy.

Other main statutory powers and duties of the trustee include:

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

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

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

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

Commented [BB26]: Question 4.4 - Sub-total = 3/4

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****