



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 83/100
Excellent results!

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

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)

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

Choose the **correct** statement:

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

- (a) 3

(b) 5

(c) 6

(d) None of the above

Question 1.4

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

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

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

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

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

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

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

- (d) Within 7 days of the appointment.

Question 1.7

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

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

Question 1.8

Choose the **correct** statement:

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

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

Question 1.9

Choose the **correct** statement:

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

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

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

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

Question 1.11

Select the **incorrect** statement:

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

Question 1.12

Choose the **correct** statement:

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

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

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

Question 1.13

Select the **correct** statement:

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

Question 1.14

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

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

Question 1.15

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

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

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

Question 1.16

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

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

Question 1.17

Select the **correct** statement:

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

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

Question 1.18

Choose the **correct** statement:

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

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

Question 1.19

Select the **correct** statement:

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

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

Question 1.20

Select the **correct** statement:

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

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

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

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

Question 2.1

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

Pursuant to O.3, r.4 of the Company Winding Up Rules ("**CWR**") every winding up petition must be supported by an affidavit sworn by the nominated liquidator ("**Consent to Act**") stating as follows: (1)

- a) He is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5 of the Insolvency Practitioners Regulations, 2018 ("**IPR**"); (1)
- b) Having made due enquiry, he believes that he and his firm meet the independence requirements contained in Regulation 6 of the IPR; (1)
- c) He and/or his firm are in compliance with the insurance requirement contained in Regulation 7 of the IPR; and (1)

He is willing to act as official liquidator if so appointed by the Court. (1)

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)

Pursuant to Regulation 6 of the IPR, a qualified insolvency practitioner shall not be appointed by the Court as an official liquidator ("**OL**") unless he can be properly regarded as independent in respect of that company (1). If the OL (or his firm and/or employee) has been engaged to audit the company within the 3 year period preceding the commencement of the wind up, he will not be considered independent. (1)

As Bodden & Ebanks ("**BE**") acted as auditors to the Company in 2021, they fall within the three year period, and as such, cannot be appointed as OL of Bluesea (1). As they have already provided consents, they should inform the Whitesand that they cannot proceed

Commented [BB3]: Question 2.1 - Sub-total = 5/5

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

with their appointment and withdraw their consents to act as OL (1). Whitesand then should find another OL who is prepared to act and file new consents.

4 marks

Question 2.3

Commented [BB5]: Question 2.3 - 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)

Pursuant to section 120 of the Companies Act (2023 Revision) ("**Companies Act**"), there are no specific qualifications Tom and Jerry need to act as voluntary liquidators ("**VLS**"). Any person, including directors / officers of the Company can act as VLs. (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)

Pursuant to section 123 of the Companies Act, within 28 days of their appointment, Tom and Jerry must undertake the following:

- a) File a notice of the winding up with the Registrar of Companies ("**Registrar**");
- b) File their consents to act with the Registrar;
- c) File the director's declaration of solvency with the Registrar (if supervision of the court is not sought);
- d) If Cheese Limited is carrying on a regulated business (i.e. a business which is required to be licensed under one or other regulatory law), serve notice of the winding up upon the Cayman Islands Monetary Authority ("**CIMA**"); and
- e) Publish notice of the winding up in the Cayman Islands Government 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)

O.13, r.9 of the CWR governs how VLs are to be remunerated. Pursuant to O.13, r.9(2) the company may choose to remunerate Tom and Jerry on any of the following bases:

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

Question 2.4 (0/2 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)

In *Natural Dairy (NZ) Holdings Limited* (unreported, 7 June 2017), the Court held that in appointing provision liquidators, it had the power to "grant the provisional liquidators such powers as the court considers necessary and appropriate to prevent such dissipation, misuse, mismanagement and misconduct and to ensure the Company's assets are properly protected pending the hearing of the winding up petition."

Put simply, the Court retains a wide discretion as to the powers to be granted to PLs, but will generally ensure the powers granted are tailored to specific tasks sought to be undertaken during the provisional liquidation. There are no automatic powers granted to PLs.

Question 2.5

Question 2.5.1 (2/4 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 who may apply to the Court to remove OLs, being either creditors (insolvent company) and/or contributories (solvent company). In

Commented [BB6]: Question 2.4 - Sub-total = 0/2

Commented [ni7]: 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.

Commented [BB8]: Question 2.5 - Sub-total = 7/9

Commented [ni9]: the answer does not mention CWR O.5, r.6.

Nor does it answer the question 'who must such an application be served on?'

BTU Power Company 2019 (1) CILR Note 7 ("**BTU Power**"), this was expanded upon by the Court:

"creditors in the case of an insolvent liquidation and contributories in the case of a solvent liquidation were the only proper persons to make the application because they had the ultimate interest in the distribution of the company's assets (Johnson v. Deloitte & Touche A.G., followed)"

With respect to what circumstances are required to remove an OL, this was also touched upon in BTU Power, where the Court stated:

"It was sufficient to satisfy the court that the removal of the liquidator would be for the general advantage of the majority of the persons interested in the liquidation; in the absence of impropriety, the court would have regard to the wishes of the majority of those interested but, where impropriety was shown, the court might override their interests (Johnson v. Deloitte & Touche A.G., [1999 CILR 297](#), followed)."

It should be noted that the Court will not remove a liquidator because a creditor has a preference for their own choice of liquidator. Common reasons as to why an OL may be removed include impropriety, conflicts of interest, failures to investigate matters and/or pursuing litigation against the wishes of creditors.

Question 2.5.2 (5/5 marks)

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

In the case of an insolvent liquidation, it is appropriate that the only persons with the power to seek the removal of the OLs are those persons who have an economic interest in the outcome of the liquidation (i.e. creditors). As the company is insolvent, contributories have no interest in the distribution of assets, and as such, no legitimate claim to intervene with respect to seeking the removal of the OLs. **(5)**

Conversely, in a solvent liquidation, it is the contributories who have such rights as they are the only group who have an interest in the final distribution of the assets of the Company as the creditors will have all been paid prior to any final distribution of the Company's assets.

Question 2.6

During a liquidation there is an expected recovery into the liquidation estate. The amount is such that the liquidation estate is no longer deemed to be insolvent and the official liquidator can settle all of the outstanding creditor claims (including interest) in full. The official liquidator has subsequently filed a revised certificate of solvency (CWR Form No 14)

Commented [ni10]: good answer which (when taken together with 2.5.1.) addresses this question fully and correctly

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

Pursuant to O.9, r.3 of the CWR, should it be the case that a company being wound up by the Court is no longer deemed insolvent by way of filing a revised certificate of solvency, then any creditor members of the liquidation committee shall automatically cease to be members and the OL must convene a meeting of contributories for the purpose of electing new members from amongst the company's contributories.

Put simply, members of the liquidation committee must have an interest in the estate, which is why creditor members automatically cease to be members as they no longer have an interest in the estate following the company no longer being deemed insolvent.

Question 2.7

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

Following the making of an order for dissolution, the liquidator will be required to take the following steps:

- a) the liquidator will act as trustee of any unclaimed dividends or undistributed assets of the company which remain in his possession or control for the benefit of the contributories or creditors to whom funds are owed;
 - (i) this requires the establishment of a trust account for any unclaimed monies;
 - (ii) after one year, transfer to financial secretary any assets or money remaining in their possession.
- b) he must retain the liquidation files in safe custody for at least three years following the order for dissolution;
- c) he must abide by the courts orders pertaining to preservation, storage and destruction of the company's remaining books and records.

Question 2.8

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

Pursuant to section 102(1) of the Companies Act, the OL is empowered to investigate why the company has failed (if it failed) and the causes of the failure, as well as (more generally) the promotion, business, dealings and affairs of the company. (1) They also may seek permission from the court to assist either CIMA or the RCIPS to investigate the conduct of directors, officers professional service providers and former employees of the company and/or institute criminal proceedings against said persons. (1)

Commented [ca11]: Question 2.6 Subtotal = 5/5

Commented [ca12]: 2.7 subtotal = 5/5

Commented [BB13]: Question 2.8 -Sub-total = 2.5/5

Their duties extend to collecting, realising and distributing the assets of the company to its creditors and/or contributories (as appropriate), and if a surplus, to those so entitled. It is also required to report to the company's creditors and contributories upon the affairs of the company. (½)

See model answer below which addresses the investigative powers and duties of a liquidator (refer to case law and legislation to substantiate your answer).

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 course 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)

Pursuant to section 101(3)(c) of the Companies Act, the OL can require employees of the company, during the period of one year immediately preceding the "relevant date" to prepare and submit a statement in the prescribed form as to the affairs of the Company. The "relevant date" is deemed to be the date that the winding up commenced, which is generally considered to be the date upon the presentation of the wind up petition. (1)

However, should it be the case that any of the events prescribed under section 101(1) of the Companies Act have occurred, the relevant date will be considered to be at the time of passing of the relevant resolution (1) or the expiry of the relevant period (½) or the occurrence of the relevant event or the date of the presentation of the petition to appoint a restructuring officer pursuant to section 91B. (½)

Please see model answer below:

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 [BB15]: Question 3.1 - Sub-total = 2/5

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

In short, no, the chosen provisional liquidator would not be able act (1) as it is requirement pursuant to Regulation 7 of the IPR that a qualified IP have professional indemnity insurance up to a limit of at least US\$10m in respect of each and every claim and at least US\$20m in the aggregate. (1)

However, the Court does have the power to make an order that the PL procure such insurance or a security bond to cover acts of fraud or dishonesty committed by either him or his staff.

2 marks - see suggested answer below, key piece missing is reference to foreign practitioner and how the IPRs specifically apply to foreign practitioners by IPR Reg 8

- 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)

Question 3.2

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

- (i) That after due enquiry and taking appropriate advice, the company is or likely to become unable to pay its debts (supported by evidence of the company's financial position); (1)
- (ii) How the company will be funded during the restructuring period; and
- (iii) That the appointment of a restructuring officer and stay on any claims against the company is in the best interest of the company and creditors (if relevant).

Commented [BB16]: Question 3.2- Sub-total = 1/2

1 mark - "that the company intends to present a compromise or arrangement to its creditors" would have got the other mark on offer.

Question 3.3

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

Pursuant to O.1A, r.1 of the CWR, unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. (½) An advertisement published shall be in CWR Form No. 3A.

In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries). (½)

The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court (½) and not less than 7 business days before the hearing date. (½)

Question 3.4

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

- a) All existing proceedings against the company are automatically stayed and no new proceedings or actions can be brought against the company without the leave of the court. Note, the restructuring moratorium will have extraterritorial effect, as a matter of Cayman Islands law. (½)
- b) It allows for the assets of the company to be secured for the benefit of creditors;
- c) It places the control (temporarily) into the hands of a qualified insolvency professional whose remit is to try and restructure the company in order that it avoids liquidation and maximises returns to creditors; (1)
- d) It gives the company time and space to seek to come to an agreement with its creditors;
- e) Creditors have the right to be heard at the hearing of the petition to appoint a restructuring officer petition (with leave of the court); and (1)
- f) Avoids having to present a wind up petition (and the adverse consequences which usually flow from such presentation) which is a requirement before a company can be placed into provisional liquidation. (1)

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

Commented [BB18]: Question 3.4 - Sub-total = 3.5/6

Commented [jo19]: Whilst this is a very good point, you needed to explain how the stay benefits the creditors as opposed to the Company.

3.5 Marks - other options/suggestions include

- 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 RPOs) – 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 RPOs to report – open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- The RPOs must report within 28 days of appointment (1 mark)
- A creditor or contributory may apply for an order discharging the appointment (1 mark)
- Secured creditors remain entitled to enforce their security. (1 mark)

Question 3.5

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

At the hearing of a restructuring petition pursuant to section 91B of the Companies Act, the court has the power to:

- Adjourn the hearing conditionally or unconditionally; (1)
- Dismiss the petition; (1)
- Make an order appointing the proposed restructuring office; (1)
- make any other order as the Court thinks fit (1), except an order placing the company into official liquidation (1), which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

5 marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

Commented [BB20]: Question 3.5 - Sub-total = 5/5

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

ELPs are governed by the Partnership Act (2023 Revision), (1) the Exempted Limited Partnership Act (2021 Revision). (1) ELPs are also governed by principles of common law and equity law applicable to partnerships. (1)

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

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 on the any of the following grounds:

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

Commented [sp22]: Question 4.2 - Sub-total = 4/5

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)

In the Cayman decision of *In the matter of Guoan International Limited* (unreported, 29 October 2021), Kawaley J confirmed that a creditor may rely upon a foreign judgment as the basis for seeking a wind up order without first obtaining recognition and/or enforcement from the Cayman court.

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

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.

Pursuant to the Bankruptcy Act, the statutory powers and duties of the trustee in bankruptcy are as follows: (4)

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

- a) power to bring or defend any legal proceeding on behalf of the bankrupt; (1)
- b) receive and adjudicate proofs of debts submitted in the bankrupt estate; (1)
- c) administer the bankrupt's estate for the benefit of creditors; and (1)
- d) carry on the trade of the bankrupt so far as may be necessary or expedient for beneficial winding up or sale of the business. (1)

For full marks, one of your examples must make reference to the section of the Bankruptcy Act ie 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).

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****