



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

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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 = 79.5/100
Excellent results!

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80/100

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 = 17/20

(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.

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

- (d) Within 7 days of the appointment.

Question 1.7

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

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

Question 1.8

Choose the **correct** statement:

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

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

Question 1.9

Choose the **correct** statement:

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

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

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

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

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

Question 1.11

Select the **incorrect** statement:

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

Question 1.12

Choose the **correct** statement:

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

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

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

Commented [BB6]: 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)

The requirement to obtain a sworn consent to act from an official liquidator is provide for under order 3, rule 4 of the Companies Winding Up Rules, 2023 (the "CWR"). The consent is required to support the petition and is in the form of an affidavit (1) sworn by the nominated official liquidator(s) (the "OL").

The CWR state that the affidavit must include the following:

- a. That the nominated OL is a qualified insolvency practitioner ("IP") and meets the residency requirements, as set out in regulation 5 of the Insolvency Practitioners Regulations, 2023 (the "Regulations"). Regulation 5 requires that the IP can only be appointed as an OL if they are resident in the Cayman Islands or they, or their firm, holds a trade and business license authorizing them or their firm to carry on the business of professional insolvency practitioners. (1)
- b. That following due enquiry, the nominated OL and their firm fulfill the independence requirements as set out in regulation 6 of the Regulations. The independence requirements state that in order to be regarded as independent, the IP, or their firm, or any company of which the IP is a director or employee, must not have, in the 3 years immediately prior to the liquidation, acting in relation to the company as its auditor. (1)
- c. That the nominated OL and their firm are in compliance with the insurance requirements contained in regulation 7 of the Regulations. Regulation 7 requires that the IP, or its firm, or any company of which the IP is a director or employee, has suitable professional indemnity insurance (as set out in the regulation), applicable to negligent performance or non-performance of the IP's duties as an OL. (1)
- d. Confirmation that the nominated OL is willing to act as the OL, if 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

Commented [BB7]: Question 2.1 - Sub-total = 5/5

Commented [BB8]: Question 2.2 - Sub-total = 1/5

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)

Under both the Regulations and the CWR, IP is under a duty of independence. While the failure to disclose involvement as auditor appears to have been a genuine oversight, the duty to maintain independence is an ongoing obligation, which the IP as an officer of the court has a duty to disclose.

If the liquidator fails to resign the position is in breach of this duty. Regulation 7 of the Regulations specifically state that the IP "shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, has acted in relation to the company as its auditor". Clearly, Bodden & Ebanks do not satisfy the independence requirements.

In the case of *in the Matter of Alpha Re Limited (in Voluntary Liquidation)* (Unreported, FSD 15 of 2018 (ASCJ), dated 2 March 2018), the Court considered the appropriate test for independence and held it to be an objective one. In light of the involvement of Bodden & Ebanks in Bluesea as auditor, notwithstanding the specific regulation against their acting, it cannot be said on an objective basis that there is no conflict.

In the circumstances, the liquidators should inform the Court and Whitesand of their conflict and withdraw from the role as OL. (1)

1 Mark - see suggested answer below

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

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

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

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

Whilst in this scenario a winding up petition date isn't provided, so I cannot definitively confirm if the proposed liquidators have acted as auditors within the 3 years immediately preceding the commencement of the liquidation, I have assumed that given Bodden & Ebanks Limited acted as auditors as recently as 2021 that the proposed liquidators would not be regarded as independent. (1 mark)

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

Commented [j09]: It's Regulation 6

Question 2.3

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

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

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

There are no qualification requirements to appoint Tom and Jerry as liquidators. Under section 120 of the Companies Act, 2023 (the "Companies Act"), any person, including a director or officer of the company, may be appointed. (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, Tom and Jerry must attend to the following:

1. File a notice of the winding up with the Registrar of Companies
2. Each file a consent to act, as liquidators, with the Registrar
3. File a directors declaration of solvency with the Registrar (if court supervision has not been requested)
4. If carrying on regulated business, service notice of winding up on CIMA
5. Publish notice of the winding up in the 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)

Pursuant to order 13, rule 9 of the CWR, the company must pass a resolution authorizing the remuneration of the liquidators. The resolution must approve the remuneration on the basis of one of the following:

- a. An hourly rate
- b. A fixed sum
- c. Commission or percentage of the assets distributed or realized
- d. Or combination of the above. (2)

If the liquidation continues for more than one year, at the end of each year the liquidators must summon a general meeting to consider and approve their remuneration for the relevant period.

Question 2.4 (2/2 marks)

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

The Courts powers are provided for under section 95 of the Companies Act. Thereunder, the Court has the power to do following:

- a. Dismiss the petition;
- b. Adjourn the hearing conditionally or unconditionally;
- c. Make a provisional order; or
- d. Any other order that it deems fit.

The exception to the above is that the Court cannot refuse a winding up order solely on the grounds that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or on the grounds that the company has no assets.

Additionally, under section 95(3), if the petition by the contributories is on the basis that it is just and equitable to wind up the company, the court has additional power to make alternative orders, as follows:

- a. An order regulating the conduct of the company's affairs in future
- b. An order requiring the company to refrain from doing or continuing to act, or not doing something, as complained of by the petitioner
- c. An order authorizing civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct
- d. An order providing for the purchase of the shares of any members of the company by other members or by the company, and in the case of the later, a reduction in the company's capital.

Question 2.5

Commented [BB11]: Question 2.4 - Sub-total = 2/2

Commented [BB12]: Question 2.5 - Sub-total = 5.5/9

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)**

Pursuant to section 107 of the Companies Act, an application can be brought to remove an OL from their role. In order to do so, either a creditor (where the company is insolvent) or contributory (where the company is solvent) can make an application for an order for the removal of the OL (the "Removal Summons"), the process for which is set out in order 5, rule 6 of the CWR.

The Removal Summons must be supported by an affidavit of the creditor or contributory setting out the reasons for the application. Case law shows that the objector seeking the removal of the OL must have a legitimate interest in the liquidation and show good reason. (See cases of *BTU Power Company* [2019 (1) CILR Note 7] and *AMP Enterprises Ltd. v Hoffman* [2002] BCC 996.) In *BTU Power Company*, a director was found not to have sufficient interest to object to the OL. In determining whether an objector has good reason, the Court will consider the wishes of the majority of the interested parties and any impropriety on behalf of the OL (See *Johnsons v. Deloitte & Touche A.G.* 1999 CILR 297).

The Removal Summons must be served on the OL and either the members of the liquidation committee or the counsel for the liquidation committee (if appointed); and any other creditors or contributories as directed by the Court.

Question 2.5.2 (1.5/5 marks)

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

For the purpose of this question, it assumed that the term "applicant" refers to the party applying to the Court to remove the OL.

The only parties who can apply to have an OL removed are creditors and contributories, dependent on the solvency of the company.

In an insolvent company, only the creditors can apply for removal and in a solvent company, only the contributories can apply. This is due to the competing interests of creditors and contributories. For example, creditors will be concerned with the realization of the company's assets to recover the money due to them. In contrast, contributories may wish to continue the business of the company. To allow a creditor apply for the removal of an OL may jeopardize the future of the company in circumstances where the company is solvent but may need to restructure the business to continue as a going concern.

Question 2.6

Commented [ni13]: I'm afraid this isn't really correct.

Both creditors and contributories are interested in having money paid to them following a liquidation. In particular, once a company has been placed into OL there is no prospect of its business continuing, as an OL is not a rescue procedure.

The question sought an answer that identified the true economic stakeholders, which are:

- in the case of a solvent liquidation, only the contributories (as creditors would all be paid in full and therefore have no interest in who is the OL); and

- in the case of an insolvent liquidation, only the creditors (as no contributories will be paid anything).

One mark awarded for the reference to BTU in question 2.5.1 and half a mark for correctly answering that the distinction is based on the differing interests of creditors and contributories.

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

Commented [ca14]: 2.6 subtotal =5/5 well thought out answer

In circumstances where the status of the changes from insolvent to solvent, the OL is required to file a Form No 14 declaring the company to be solvent. In such case, the OL is then only required to convene meetings of contributories, in accordance with order 8, rule 1(5).

Pursuant to order 9, rule 3 of the CWR, once the company is declared solvent, the creditor members of the liquidation committee (the "LC") automatically cease to be members and the OL must convene a meeting of contributories to elect a new LC. Under order 9, rule 1(3), the LC must be comprised of not less than three or 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 [ca15]: 2.7 Subtotal 5/5 note the CWRs at O.22, r.2) incorrectly reference Order 25 (which deals with Official Liquidators Lawyers) when it should be O.26 (Liquidation Files, Companies books and records and court files)

Under order 22, rule 2(3), once the order for dissolution is perfected the liquidator must file the order with the Registrar of Companies within 14 days.

The order for dissolution will set out any additional steps that the liquidator is required to take, to include *inter alia* the following:

- a. Retention of the whole or part of the liquidation files for a minimum of 3 years, as per order 25, rule 1
- b. Retention, storage and destruction of the company's books and records, as per order 25, rule 2

Commented [ca16]: Order 26

Commented [ca17]: Order 26

The liquidator also becomes trustee of any unclaimed dividends or undistributed assets - pursuant to section 153 of the Companies Act. Under order 23 of the CWR the liquidator must set up a trust account for any unclaimed dividends. Further, they must transfer title of the undistributed assets to be held on trust for the beneficiaries.

Question 2.8

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

Commented [BB18]: Question 2.8 - Sub-total = 3/5

A liquidator is granted power, under section 102 of the Companies Act, to carry out investigations into the company. Where a winding up order is made, the liquidator has the power 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 thereafter, to make such report, if any, to the Court as the liquidator thinks fits. **(1)**

Additionally, the liquidator has the power, subject to obtaining powers from the Court, to assist CIMA and the RCIPS to investigate the conduct of either: **(1)**

- a. current or former directors of the company
- b. current or former professional service providers to the company or
- c. current or former employees of the company during the year immediately preceding the date of appointment of a provisional liquidator or the date of commencement of the winding up (as per section 101(3) of the Companies Act) and to institute and conduct a criminal prosecution of any of the persons referred to above. **(1)**

To improve your responses, ensure they are commensurate with the mark allocation - while 2.8 asks you to describe, it is for 5 marks. See the memo below of a structured 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)**

Under section 101(6) of the Companies Act, "relevant date" is defined as either, in the case of the appointment of a provisional liquidator, the date that the provisional liquidator was appointed or otherwise, the date of commencement of the winding up. **(1)**

Commented [BB19]: Question 2.9 - Sub-total = 1/5

To improve your responses, ensure they are commensurate with the mark allocation – while 2.9 asks for an explanation, it is for 5 marks. See the memo below for a structured answer:

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 [BB20]: Question 3.1 - Sub-total = 3/5

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

The insurance requirements for insolvency practitioners seeking to be appointed by the Court as official liquidators are set out Regulation 7 or the Insolvency Practitioners' Regulations (2023 Consolidation). (1)

The Regulation states that the insolvency practitioner, or their firm, must have professional indemnity insurance applicable to the negligent performance or non-performance of the qualified insolvency practitioner's duties as an official liquidator. The limit of the insurance must be at least US\$10 million in respect of each and every claim and at least US\$20 million in aggregate, with a deductible of not more than US\$1 million (1). In particular circumstances, the Court can order that the official liquidator shall obtain insurance with a higher limit or alternatively, to obtain a security bond.

In this instance, unless the provisional liquidator is prepared to increase the limit of his policy, he will not be appointed as official liquidator. (1)

3 Marks - no acknowledgment the chosen provisional liquidator is based in Hong Kong and therefore would be deemed a foreign practitioner. Specific cross reference to Regulation 8 of the IPRs and how that then pulls in the insurance requirements under Regulation 7 of the IPRs applicable also to foreign practitioners would have resulted in extra marks.

Question 3.2

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

Pursuant to section 91B(1) of the Companies Act sets out the test for appointment of a restructuring officer. Firstly, the company is or likely to become unable to pay its debts. (1) Secondly, the company intends to present a compromise or arrangement to its creditors. (1) This test was confirmed in the case of *Re Oriente Group Limite* (FSD 231 of 2022, unreported, Kawaley J, 8 December 2022).

2 Marks

Question 3.3

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

Under order 1A, rule 1(3) of the CWR, notice of the restructuring petition for appointment of a restructuring officer shall be advertised once in a newspaper circulated in the Cayman Islands, in the CWR form No 3A. (½)

Additionally, if the company carries on business outside of the Cayman Islands, unless the

Commented [BB21]: Question 3.2 - Sub-total = 2/2

Commented [BB22]: Question 3.3 - Sub-total = 2/2

Court directs otherwise, an advertisement should also be placed in a newspaper having circulation in a country or countries most likely to come to the attention of the company's creditors (including contingent or prospective creditors) and contributories. (½) The advertisement should also be published in the official language of such countries.

The advertisements should be published not more than 7 days after the petition for appointment of the restructuring officer is filed in court (½) and not less than 7 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)

1. The overall purpose of the regime is to put in a place a scheme of arrangement to assist both the company and its creditors. The restructuring officer is subject to court oversight and is held to be an officer of the court, ensuring transparency in the process. (1)
2. Creditors are divided into classes of similar creditors and given an opportunity to vote on the proposed scheme at a scheme meeting. The Court then has to sanction the proposed scheme and will take into account the following considerations:
 - a. The approval of the scheme was reasonable
 - b. That each class of creditors was fairly represented at the scheme meeting
 - c. That the majority acted bona fide
 - d. That all notice periods were met, and
 - e. The resolutions of the classes were carried by the requisite majority
3. While an automatic worldwide moratorium is put in place against unsecured creditors filing a winding up petition, secured creditors can still pursue enforcement actions in respect of their debts. (1)
4. Once the moratorium is in place, the company has time to consider an appropriate restructuring proposal. As creditor approval is required to approve the proposal, this opportunity is usually in the creditors best interests. (1)
5. Creditors are given an opportunity to be represented at the hearing of a restructuring officer petition. Additionally, the creditor can still file a winding up petition in advance of the restructuring petition, provided the first seek leave of the court to do so. (1)

4 Marks - some of the other suggested points would have been any of the following

- 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 a RPO) - 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)

Commented [BB23]: Question 3.4 - Sub-total = 4/6

- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (1 mark)
- A requirement for the ROs to report - open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- The ROs must report within 28 days of appointment (1 mark)
- A creditor or contributory may apply for an order discharging the appointment (1 mark)

Question 3.5

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

Upon hearing a restructuring petition, the Court has the power, under section 91B of the Companies Act to do the following:

- make an order appointing the restructuring officer (1)
- adjourn the hearing conditionally or unconditionally (1)
- dismiss the petition or (1)
- make any other order as deemed fit. (1)

The Court however, does not have the power to make an order placing the company into official liquidation (1) which can only be done on the presentation of a winding up petition. A creditor can present a winding up petition following a restructuring petition but to do this, the creditor must apply for leave. If granted, the court can hear both petitions at the same time.

5 Marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

Commented [BB24]: Question 3.5 - Sub-total = 5/5

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

The principle laws governing ELPs, in addition to the Limited Partnership Agreement, are the principles of common law and equity applicable to partnerships (1 mark) as modified by the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision). (1) While the Companies Act and the CWR also apply to ELPs, where there is any conflict or inconsistencies between the Companies Act and the Exempted Limited Partnership Act, the Exempted Limited Partnership Act takes priority.

Commented [BB25]: Question 4.1 - Sub-total = 2/3

Question 4.2

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

The Cayman Islands Court has jurisdiction to wind up a foreign company, in limited circumstances, as provided for under section 91(d) of the Companies Act, as follows:

- i. where the foreign company has property located in the Cayman Islands
- ii. When the foreign company is carrying on business in the Cayman Islands
- iii. When the foreign company is the general partner of an ordinary limited partnership or an exempted limited partnership
- iv. Where the foreign company is registered under Part IX of the Companies Act. Part IX requires a foreign company to register in the Cayman Islands details as to where it establishes its place of business, or commences carrying on business in the Cayman Islands

Commented [sp26]: 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)

It is not necessary for a judgment of a foreign court to be registered or enforced in the Cayman Islands, before it can be relied upon as the basis for seeking a winding up order. This matter was considered at length by Mr. Justice Kawaley in his judgment in *Re China Hospitals* [2018 (2) CILR 335] and held that registration and/or enforcement as not necessary to for seeking a winding up order. This was re-affirmed in *In the matter of Guoan International Limited* (unreported, 29 October 2021). In this decision, notwithstanding that

Commented [sp27]: Question 4.3 - Sub-total = 3/3

the judgment was under appeal in the foreign court, the judgment could be relied upon as final and conclusive, in order to form the basis of the winding up petition.

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. Until the provisional order for bankruptcy is made absolute, under section 38 of the Bankruptcy Act (1997 Revision), the trustee is under a duty to preserve all property, so far as is possible, so that it can be returned to the debtor in the same condition, in the event that the provisional order is revoked. (1)
- b. When an absolute order for bankruptcy is made against the debtor, under section 65 of the Bankruptcy Act, the trustee shall proceed to administer the estate of the debtor for the benefit of the creditors. (1)
- c. In administering the estate, the trust has the power to sell the property of the debtor, as the trustee sees fit (as per section 78 of the Bankruptcy Act). Additionally, the trustee may also carry on the trade of the debtor, as is necessary or expedient, for the winding up or sale of the business (as per section 79 of the Bankruptcy Act). (1)
- d. The trustee may bring or defend any legal proceedings or action relating to the property of the debtor, as per section 80 of the Bankruptcy Act. Additionally the trustee has power to compromise claims, either for or against the debtor, under sections 82 and 83 of the Bankruptcy Act. (1)
- e. Under section 87 of the Bankruptcy Act, the trustee has a duty to received and decide upon proof of debts.

Commented [BB28]: Question 4.4 - Sub-total = 4/4

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****