



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!

Commented [BB2R1]: Mark adjusted upwards to 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)

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

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

Choose the **correct** statement:

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

- (a) 3

(b) 5

(c) 6

(d) None of the above

Question 1.4

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

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

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

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

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

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

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

- (d) Within 7 days of the appointment.

Question 1.7

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

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

Question 1.8

Choose the **correct** statement:

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

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

Question 1.9

Choose the **correct** statement:

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

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

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

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

Question 1.11

Select the **incorrect** statement:

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

Question 1.12

Choose the **correct** statement:

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

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

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

Question 1.13

Select the **correct** statement:

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

Question 1.14

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

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

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)

Answer:

As set out in O.3, r. 4 (1) of the Cayman Islands Companies Winding Up Rules (2023 Consolidation), every winding up petition shall be supported by an affidavit sworn (1) by the person or persons nominated for appointment as official liquidator.

The affidavit must contain the following information:

1. A statement that he/she is a qualified insolvency practitioner ("IP") within the meaning of the Insolvency Practitioners' Regulations ("IPR"); (1)
2. A statement that he/she meets the residency requirement contained in Regulation 5 of the IPR; (1)
3. A confirmation that the person has made due enquiry and believes that he/she and their firm meet the independence requirement in Regulation 6 of the IPR; (1)
4. A confirmation that he/she and/or their firm comply with the insurance requirement contained in Regulation 7 of the IPR; and (1)
5. A statement that the person is willing to act as official liquidator if appointed. (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)

Answer:

1. The proposed liquidators will *not* be able to act in relation to Bluesea (1). Explanations are detailed below.
2. The Insolvency Practitioners' Regulations set out several prerequisites that must be satisfied for an individual to be eligible to act as an official liquidator. Regulation 6 states that: (1)
 - a. A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of a company unless that person can be properly regarded as independent as regards that company.

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

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

- b. A qualified insolvency practitioner 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. (1)
3. Due to the fact that that Bodden & Ebanks Limited previously acted as auditors of Bluesea in 2021, which is within 3 years immediately preceding the commencement of the liquidation, the proposed liquidators cannot be regarded as independent. Thus, they will not be permitted to act as official liquidators. (1)
4. The proposed liquidators should withdraw their consents to act and resign immediately. (1)

5 Marks

Question 2.3

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

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

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

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

Answer:

Tom and Jerry do not need any qualifications to act as voluntary liquidators. Any person can be appointed as a voluntary liquidator. (1)

Question 2.3.2 (2/2 marks)

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

Answer:

Section 123 of the Companies Act specifies that within 28 days of the appointment of the voluntary liquidators, the voluntary liquidators shall

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

Answer:

1. As set out in the Cayman Islands Companies Winding Up Rules (2023 Consolidation) O.13, r.9, "the basis of the voluntary liquidator's remuneration and the amount of the voluntary liquidator's remuneration shall be authorised by resolution of the company."
2. The basis of the voluntary liquidator's remuneration can be any of the following:
 - a. an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation;
 - b. a fixed sum;
 - c. a commission or percentage of the assets distributed or realised; 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)

Answer:

1. The Court can grant an order to appoint a provisional liquidator;
2. Under section 95(1)(d) of the Companies Act, the Court can also make "any other order that it thinks fit" upon hearing a winding up petition.

Question 2.5

Question 2.5.1 (3/4 marks)

Commented [BB7]: Question 2.4 - Sub-total = 0/2

Commented [ni8]: 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 [BB9]: Question 2.5 - Sub-total = 7/9

Commented [ni10]: No reference to CWR O.5, r.6, which was required for the 4th mark.

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)

Answer:

Section 107 of The Cayman Islands Companies Act (2023 Revision) states that "An official liquidator may be removed from the office by order of the Court made on the application of a creditor or contributory of the company." In a solvent liquidation, contributories are the only parties that have ultimate interest in the distribution of the company's assets. Hence, only contributories can apply to remove an official liquidator. On the other hand, in an insolvent liquidation, creditors are the only parties that have ultimate interest in the distribution of the company's assets. Therefore, only creditors can apply to remove an official liquidator. The application by a contributory or a creditor must be made by way of a summons (a "Removal Summons"). The Removal Summons must be served on the official liquidator, each member of the liquidation committee, counsel of the liquidation committee (if applicable), and any other creditors or contributories as directed by the Court.

Question 2.5.2 (4/5 marks)

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

Answer:

1. Certain order of payment priority from the liquidation estate shall be followed in an official liquidation. The priority of distribution relevant to this question is detailed below:
 - a. fixed charge creditors;
 - b. claims of preferred creditors;
 - c. expenses of the liquidation;
 - d. ordinary unsecured creditors; and
 - e. returning capital to shareholders
2. In an insolvent liquidation, the company is not able to pay its debts when they become due and there will not be any assets to be distributed to contributories. Therefore, only the creditors of the company will have ultimate interest in the company's assets.
3. However, in a solvent liquidation, creditors will be paid in full and the contributories will have ultimate interest in the company's assets, thus the contributories can apply to remove an official liquidator.

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 [ni11]: Good answer, only missing a reference to the BTU Power Company case, cited in the course notes as relevant to this question, which was required for the 5th mark.

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

Commented [ca12]: Question 2.6 Subtotal = 4/4 marks

Answer:

1. As set out in the Cayman Islands Companies Winding Up Rules (2023 Consolidation) O.9, r.3, "if, during the course of the liquidation, the official liquidator changes the official liquidator's certification of the company's solvency or insolvency (as the case may be), the official liquidator shall take the following steps to reconstitute the liquidation committee."
2. For a company that is certified to be solvent, any creditor members of the company's liquidation committee shall automatically cease to be members.
3. A meeting of contributories should be convened by the official liquidator for the purpose of electing new members from amongst the company's contributories for the liquidation committee.
4. As the company is solvent, the liquidation committee shall comprise not less than three nor more than five contributories.
5. A certificate in CWR form 15 stating the name, address and contact details of each member of the new liquidation committee shall be filed with the Court.

Question 2.7

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

Commented [ca13]: Question 2.7 Subtotal 4/5

Answer:

1. According to the Cayman Islands Companies Winding Up Rules (2023 Consolidation) O.22, r.2, the official liquidator shall file the order for dissolution with the Registrar of Companies within 14 days from the date the order is perfected.
2. The Cayman Islands Companies Winding Up Rules (2023 Consolidation) Order 23 further sets out that "following the dissolution of a company, whether pursuant to section 151 or an order for dissolution made under section 152, the former liquidator shall be trustee of any unclaimed dividends or undistributed assets of the company which remain in the former liquidator's possession or control for the benefit of the contributories or creditors to whom such funds are owed." Below steps should be taken by the former liquidator:
 - a. establish trust account;
 - b. transfer undistributed assets into the liquidator's own name "as trustee of the creditors or members of [name of company], dissolved";
 - c. make payments out of the trust account and transfer of undistributed assets;
 - d. at the end of one year from the date upon which the company was dissolved transfer any money or assets remaining in the hands of the former liquidator as trustee to the Financial Secretary.

For full marks needed to reference the below:

- Upon the making of an order dissolving a company, the official liquidator's duties as officeholder cease save for any residual duties preserved by the order for dissolution, including for the preservation, storage and destruction of the company's remaining books and records, and dealings with unclaimed dividends. An order for discharge of the liquidators is often included in the order for dissolution.
- Following the dissolution of a company, the liquidator shall retain the liquidation files in safe custody for at least 3 years pursuant to O.26, r.2(3) of the CWR.
- Upon making an order for dissolution, the court shall give directions in respect of the preservation, storage and destruction of the company's remaining books and records pursuant CWR O.26, r.3(4) and in accordance with r.3(6), the cost of post-dissolution storage and destruction of a company's books and records shall be an expense of the liquidation for which provision must be made in the official liquidator's final accounts.

Question 2.8

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

Answer:

1. Section 102 of the Companies Act provides the official liquidators with certain investigative powers. (½) refer to case law to substantiate your answer
2. Section 102(1) empowers the liquidator to investigate below and make report on such to the Court if the liquidator thinks fit:
 - a. If the company has failed, the cause of the failure; and
 - b. Generally, the promotion, businesss, dealings and the affairs of the company, (1)
3. Section 102(2) further explains that subject to obtaining directions from the Court, the liquidator shall have power to –
 - a. assist the Authority and the Royal Cayman Islands Police Service to investigate the conduct of persons referred to in section 101(3); and (½) a further mark would have been awarded if you listed the employees subject to this section
 - b. institute and conduct a criminal prosecution of persons referred to in section 101(3). (1)

See model answer below:

A liquidator is an officer of the court with certain general duties which were summarised in the Cayman Islands case *In the Matter of Citrico International Limited* [2004-05 CILR 435] (citing *Gooch's Case* 1872, 7 Ch App 207), (1 mark) as requiring the liquidator "to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the courts of his investigation, which is material to ascertain the exact truth in every case before the Court". (1 mark) In addition

Commented [BB14]: Question 2.8 - Sub-total = 2.5/5

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)**

Answer:

1. Pursuant to Section 101(1) of the Companies Act, a liquidator can require some or all of the persons identifies in section 101(3) of the Act to prepare and submit a Statement of Affairs (SOA).
2. The persons listed in Section 101(3) are:
 - a. persons who are or have been directors or officers of the company;
 - b. persons who are or have been professional service providers to the company; and
 - c. (persons who are or have been employees of the company, during the period of one year immediately preceding the relevant date.
 - d. Section 101(6) further explains that in this section relevant date means:
 - a. in a case where a provisional liquidator is appointed, the date of that person's appointment;
 - b. in any other case, the commencement of the winding up. **(1)**
3. The commencement of the winding up generally refers to the presentation of the winding up petition, with below exceptions:
 - a. when a resolution was passed by the company for voluntary winding up; **(½)**
 - b. any fixed period for the duration of the company by the articles of association; **(½)**
 - c. the occurrence of the event as specified in the memorandum or articles of association provide that the company is to be wound up; and **(½)**
 - d. in the case of a restructuring officer being appointed but a restructure plan was failed to be implemented, the winding up will be deemed to have commenced on the date of the presentation of the restructuring petition. **(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

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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

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

Answer:

The chosen provisional liquidators will *not* be appointed by the Grand Court of the Cayman Islands for the reasons listed below:

1. Based on the fact that the chosen provisional liquidator is based in Hong Kong, it is likely that the person is a foreign practitioner, who, according to section 89 of the Companies Act (2023 Revision) is "a person who is qualified under the law of a foreign country to perform functions equivalent to those performed by official liquidators under this Act." (1) A foreign practitioner may not be appointed as sole liquidator of a company as specified in Regulation 8 of the Insolvency Practitioners' Regulations (the "IPR"). (1)
2. If the Hong Kong based practitioner meets the professional qualification requirements in Regulation 4 of the IPR, he or she will still fail the residency requirement in Regulation 5 of the IPR, which requires the qualified insolvency practitioner to be a resident of the Cayman Islands and the person or the person's firm/company holds a trade and business license which authorizes him or his firm to carry on business as professional insolvency practitioners.
3. In addition, insurance requirement in Regulation 7 of the IPR that applies to both local and foreign insolvency practitioners is not met. Regulation 7 specifies that a qualified insolvency practitioner shall not be appointed by the Court unless the person and the person's firm/company have professional indemnity insurance "up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in the aggregate, with a deductible of not more than US\$1 million." (1)

3 marks - aside from the incorrect reference/quote of Regulation 5 in the context of foreign practitioners, points would also have been given for referencing the fact the foreign practitioner only had \$5mm coverage, and that he should consider increasing that coverage if he wanted to take the appointment.

Question 3.2

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

(2)

Answer:

According to Section 91B (1) of the Companies (Amendment) Act, the petition presented by the company to the Court for the appointment of restructuring offices must demonstrate that:

Commented [jo17]: This doesn't apply to foreign IP's anyway per the wording in Regulation 8

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

1. The board of the company believes that the company is or is likely to become unable to pay its debts; and (1)
2. The company intends to present a comprise or arrangement to its creditors. (1)

2 marks

Question 3.3

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

Answer:

According to the Cayman Islands Companies Winding Up Rules (2023 Consolidation) O.1A, r.1,

1. 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)
2. 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)
3. 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)

Answer:

1. It is set out in the Cayman Islands Companies Winding Up Rules (2023 Consolidation) O.1A, r1 that "every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands" and "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)." Thus, creditors have the opportunity to appear and be heard on the hearing of a restructuring petition. (1)
2. A creditor may apply to the Court for a variation or a discharge of an order appointing the restructuring officers. (1)
3. A creditor may also apply to the Court for the removal and replacement of restructuring officers. (1)

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

Commented [BB20]: Question 3.4 - Sub-total = 4/6

4. Creditors with security over assets of the company will remain entitled to the enforcement of the security without the leave of the Court or reference to the restructuring officers. (1)
5. Creditors can still present a winding up petition in respect of the company following presentation of a restructuring petition with leave of the Court.

4 marks - other suggested answers below.

- The default position is that a Restructuring Petition will be heard on notice to stakeholders (while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made ex parte by default) (1 mark)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint JPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (1 mark)
- A requirement for the RCOs to report - open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- The RCOs must report within 28 days of appointment (1 mark)

Question 3.5

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

Answer:

1. As provided in section 91G of the Companies Act, "at any time after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose."
2. Section 91H of the Companies Act provides that "notwithstanding the presentation of a petition for the appointment of a restructuring officer or the appointment of a restructuring officer by the Court under section 91B or 91C, a creditor who has security over the whole or part of the assets of the company is entitled to enforce the creditor's security without the leave of the Court and without reference to the restructuring officer appointed under section 91B or 91C."
3. Thus, the relief available and unavailable are

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- a. stay on all existing proceedings and commencement of new proceedings against the company, with the exception of criminal proceedings;
- b. however, the secured creditors are still entitled to enforce their security.

0 marks - the question is asking what options the Court has at the time of hearing the restructuring petition, answer as follows:

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

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

Answer:

- 2 principal statutes that govern the formation and operation of the Cayman Islands' ELPs are the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision) (the ELP Act). (1) and the principles of common law and equity applicable to partnerships
- In the context of winding up, Part V of the Companies Act and the Cayman Islands Companies Winding Up Rules (2023 Consolidation), with modifications, also apply to ELPs. It is worth noting that where there are inconsistencies, the ELP Act will take priority over the Companies Act.

Question 4.2

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

Answer:

Section 91(d) of the Companies Act specifies that the Cayman Islands court has jurisdiction to make winding up orders in respect of a foreign company which:

- has property located in the Islands;
- is carrying on business in the Islands;
- is the general partner of a limited partnership; or
- is registered under Part IX.

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)

Answer:

- In general, a judgement or order of a foreign court has no direct legal effect in the Cayman Islands, thus is not enforceable in the Cayman Islands in or of itself.
- The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides that foreign judgments in specified foreign courts (certain courts of Australia) may be registered in the Cayman Islands and enforced in the same manner as a domestic

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Commented [sp23]: Question 4.2 - Sub-total = 4/5

Commented [sp24]: Question 4.3 - Sub-total = 3/3

judgement.

3. According to common law, foreign judgments that cannot be registered under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) must be enforced by commencing a new action in the Cayman Islands, where the foreign judgment can be used as evidence.
4. However, it is worth noting that in *In the matter of Guoan International Limited (unreported, 29 October 2021)* Kawaley J's first-instance judgment confirms that a foreign judgment may be relied upon by a creditor as the basis for seeking a winding up order without first obtaining recognition or enforcement orders from the Court of the Cayman Islands.

Question 4.4

Commented [BB25]: Question 4.4 - Sub-total = 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)

Answer:

1. Until the provisional order is made absolute, the trustee has duty to preserve the property. If the provision order is revoked, the property shall be returned to the debtor. (1)
2. If it is necessary or expedient for the winding up or sale of the business, the trustee can carry on the trade of the debtor. (1)
3. The trustee also has the and duty to bring or defend any legal proceedings related to the debtor's property. (1)
4. As set out in Rule 26 of the Cayman Islands (Bankruptcy) Rules, the trustee may "in that trustee's discretion, accept proofs of debt after the prescribed time limit and shall examine every proof filed with that trustee (1) and the grounds thereof and may in writing
 - a. admit it in whole or in part;
 - b. reject it, giving reasons for such rejection; or
 - c. require further evidence in support thereof.

For an additional mark one of your examples must contain the 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 ****