



INSOL
INTERNATIONAL



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

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

EXAMINERS

Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers
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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 = 89.5/100 - Excellent results, well done!

Commented [BB2R1]: Mark adjusted to 90/100

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 = 19/20

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.

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

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 Cayman Islands Companies Winding Up Rules, 2018 (as amended) (the **CWR**) set out the required content of the consent to act to be signed by the proposed official liquidator(s) at Order 3, rule 4(1). Under that rule, each person nominated for appointment as official liquidator must swear an affidavit stating that: (1)

- (a) That person is a qualified insolvency practitioner and meets the residency requirement provided for by Regulation 5 of the Insolvency Practitioners' Regulations (2023 Consolidation) (the **IPRs**) (O.3, r.4(1)(a)). (1)

Under Regulation 5, that person must be resident in the Cayman Islands and hold a trade and business licence authorising them or their firm to carry on business as professional insolvency practitioners in the Cayman Islands. (1)

- (b) That person believes that they and their firm meet the independence requirement contained in Regulation 6 of the IPRs (O.3, r.4(1)(b)). (1)

Under Regulation 6, a qualified insolvency practitioner must be capable of being properly regarded as independent of the company in question. That person will not be regarded as independent if, within 3 years prior to the commencement of the liquidation, that person, or their firm / company, has acted as the company's auditor.

- (c) That person and/or their firm comply with the insurance requirement provided by Regulation 7 of the IPRs (O.3, r.4(1)(c)). (1)

Under Regulation 7, a qualified insolvency practitioner will not be appointed as an official liquidator unless that person and their firm/company has professional indemnity insurance covering their negligence or non-performance as an official liquidator up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in aggregate, with a maximum deductible of US\$1 million.

- (d) That person's willingness to act as official liquidator if appointed by the Court (O.3, r.4(1)(d)). (1)

Order 3, rule 4(2) of the CWR sets out the required consent of the consent to act to be signed by any jointly appointed foreign qualified insolvency practitioner, including that person's professional qualifications (O.3, r.4(2)(a)) and professional experience (O.3, r.4(1)(c)), in addition to the independence and insurance requirements contained in Regulations 6 and 7 of the IPRs described above.

5 marks

Question 2.2

Commented [BB6]: Question 2.2 - Sub-total = 3/5

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

As Bodden & Ebanks Limited (**B&E**) previously acted as auditors of Bluesea in 2021, and the liquidation was commenced by Whitesand in 2023, less than 3 years later, B&E now cannot satisfy the independence requirement provided by the CWRs (Order 3, rule 4(1)(b)) and IPRs (Regulation 6(2)) (1) which provide that an insolvency practitioner will not be regarded as independent if, within 3 years prior to the commencement of the liquidation, that person, or their firm / company, has acted as the company's auditor (the **Independence Issue**). (1)

Whilst the Independence Issue came to light after B&E had already provided their consents to act and there is no industry regulator of insolvency professionals in the Cayman Islands, as a matter of professionalism, ethics and as would-be Officers of the Court once appointed (of which the highest standard of conduct is expected (see the English case of *Re Condon; ex parte James* (1873-74) LR Ch App 609 at 614), the proposed liquidators should file updated affidavits with the Court without delay explaining the Independence Issue and how it has come to light, withdrawing their consents to act and decline the appointment to act as liquidators of Bluesea. (1) There is no need for B&E to follow the formal resignation procedure provided for official liquidators under the CWRs (O.5, r.4), as B&E had not yet been appointed, but B&E should also review their internal systems and procedures to try to minimise the risk of the Impendence Issue, or similar, arising in future.

3 marks - 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)

In this scenario the winding up petition date is in May 2023, the proposed liquidators or their firm have acted as auditors within the 3 years immediately preceding the commencement of the liquidation, given Bodden & Ebanks Limited acted as auditors as recently as 2021 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)

Question 2.3

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

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

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1

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

There is no formal requirement for Tom and Jerry to have any specific qualifications as section 120 of the Cayman Islands Companies Act (2023 Revision) (the **Companies Act**) provides that any person, including a director or officer of the company, may be appointed as its voluntary liquidator. In practice, however, qualified insolvency practitioners do tend to be appointed as voluntary liquidators in the Cayman Islands. (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)

Section 123 of the Companies Act provides that within 28 days of the commencement of a voluntary winding up, Tom and Jerry as liquidators must:

- (a) File notice of the winding up with the Registrar of Companies (the **Registrar**) (s.123(1)(a)), in the form of CWR Form No. 19;
- (b) File their respective voluntary liquidators' consents to act with the Registrar (s.123(1)(b)), in the form CWR Form No. 20;
- (c) File the director's declaration of solvency with the Registrar, if applicable

- (s.123(1)(c)), in the form CWR Form No. 21;
- (d) If the company is a regulated business, serve notice of the voluntary winding on the Cayman Islands Monetary Authority (**CIMA**) (s.123(1)(d)); and
- (e) Publish notice of the winding up in the Gazette (s.123(1)(e)). (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)

The company may resolve to remunerate Tom and Jerry as voluntary liquidators on the following bases, as provided by O.13, r.9(2) of the CWRs:

- a) An hourly rate (or scale of rates) for time reasonably and properly spent on the liquidation;
- b) A fixed sum;
- c) A commission or percentage of the assets distributed or realised; or
- d) A combination of the above. (2)

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 following powers are available to the Court on hearing a winding up petition, as provided for by section 95 of the Companies Act:

- a) The petition may be dismissed;
- b) The hearing may be adjourned (conditionally or unconditionally);
- c) The Court may stay the petition, allowing the provisional liquidator to remain in office for the time being; or
- d) Any other order that it thinks fit.

Question 2.5

Question 2.5.1 (4/4 marks)

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

The ability to remove official liquidators from office is provided for by section 107 of the Companies Act, which states that creditors or contributories of the company can do so by application to the Court (often referred to as a "removal summons").

The removal summons must be served on the official liquidator, each member of the liquidation committee (the **LC**), or counsel for the LC (if appointed to act for the LC

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

Commented [ni9]: This isn't quite the answer we were looking for (which was 'make a provisional order - s.95(1)(c)'), but given that you have thought through what the answer would be if the Court had already appointed PLs (which is possible on the facts of this question). then I'm still going to give you full marks for this answer.

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Commented [ni11]: great answer

generally) and other creditors as the Court might direct (CWRs, Order 5, r.6).

The Companies Act provides the Court with a broad discretion to remove official liquidators, but it will only do so for good reason (see *AMP Enterprises Ltd. (t/a Total Home Entertainment) v Hoffman* [2002] BCC 996). In the absence of any impropriety by the liquidators, the Court will grant the removal if it would be for the general advantage of the majority of persons interested in the liquidation (*In the Matter of BTU Power Company (in Official Liquidation)* 2019 1 CILR Note 7). However, the Court might override those interests in cases where impropriety is shown (*ibid*). There is also authority for liquidators to be removed for impropriety, misconduct or unfitness as explained in McPherson, *The Law of Company Liquidation*: “This requirement may be satisfied by proof of some breach of duty or want of efficiency or appearance of partiality of conflict of duty...” (at pages 228-229).

Question 2.5.2 (5/5 marks)

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

The class of potential applicant varies in accordance with the solvency of the company because the interests requiring protection differ in each case. In an insolvent liquidation, it is a given that the shareholders will not be paid, and so the interests of creditors come into focus and creditors will be the applicants. In the case of a solvent liquidation, the creditors will be paid in full, and so the interests of shareholders come to the fore, and the applicants will be contributories.

Question 2.6

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

The official liquidators' determination of solvency has an impact on the constitution of the liquidation committee (LC).

Under CWR Order 9, rule 3, the liquidator is required to take steps to reconstitute the LC if the certification of the company changes from insolvent to solvent (or vice versa). In this case, where the company is now solvent, CWR O.9, r.3(2) provides that any creditor members of the LC will automatically cease to be members, and the official liquidator must convene a meeting of contributories only for the purposes of electing new members to the LC from amongst those contributories.

For full marks reference to the fact that the committee of a solvent company is comprised of

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not less than three, no more than five, contributories (Order 9, r.1 (3)).

Question 2.7

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

The liquidator will apply to dissolve a company once its affairs have been fully wound up (Companies Act, section 152). The official liquidator must file the order for dissolution with the Registrar of Companies (Companies Act, section 152(3)). Any failure by the official liquidator to do so within 14 days from the date which the dissolution order was perfected will be guilty of an offence (Companies Act, section 152(4)). The liquidator must hold any unclaimed dividends or undistributed assets on trust for the benefit of the relevant contributories or creditors (section 153(1)). If any unclaimed dividends or undistributed assets remain at the end of one year after the dissolution, the former liquidator must transfer the funds or assets to the Cayman Islands Minister of Finance, who must manage them in accordance with Part VIII of the Public Management and Finance Act (2020 Revision) (Companies Act, section 153(2)).

Commented [ca13]: Question 2.7 subtotal 2/5

Commented [ca14]: 1 mark

Commented [ca15]: 1 mark

For full marks references to the following to be made:

- Upon the making of an order dissolving a company, the official liquidator's duties as officeholder will 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.

Question 2.8

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

Under the Companies Act, official liquidators (OLs) have broad investigatory powers not available to the company itself:

- OLs can require relevant individuals to provide statements of the company's affairs, verified by a sworn affidavit (section 101);
- OLs can investigate the causes of the failure of the company, as appropriate, as well as its general promotion, business, dealings and affairs (section 102(1)); (1)
- With the direction of the Court, the OLs can assist the Cayman Islands Monetary Authority (CIMA) and the Royal Cayman Islands Police Service to investigate the conduct of certain individuals related to the company (section 102(2)); (1)

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- d) OLs can seek permission from the Court to examine certain individuals, and to demand delivery of property or documents belonging to the company (section 103);

The results of OLs' investigations can be reported to the Court as the OLs see fit.

The investigatory powers of provisional liquidators (**PLs**) are limited to (requiring certain persons to provide statements of affairs relevant to the company, as per (a) above.

In your answer refer to case law, see model answer below:

A liquidator is an officer of the court with certain general duties which were summarised in the Cayman Islands case *In the Matter of Citrico International Limited* [2004-05 CILR 435] (citing *Gooch's Case* 1872, 7 Ch App 207), (**1 mark**) as requiring the liquidator "to make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, which has come to his knowledge in the courts of his investigation, which is material to ascertain the exact truth in every case before the Court". (**1 mark**) In addition to this general duty, section 102(1) of the Companies Act expressly empowers the liquidator to investigate (a) if the company has failed, the causes of the failure; and (b) generally the promotion, business, dealings and affairs of the company, and to make such report if any to the court as the liquidator thinks fit (**1 mark**). Additionally, the liquidator is also empowered (subject to obtaining directions from the court) to assist the CIMA and the RCIPS to investigate the conduct of persons, and institute and conduct a criminal prosecution of person referred to in section 101(3) of the Act. Those persons include existing or former directors or officers of the company; (b) professional service providers to the company; and (c) employees of the company, during the period of one year immediately preceding the relevant date. (**2 marks**)

Question 2.9

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

Liquidators can require certain individuals to provide statements of the company's affairs, verified by a sworn affidavit under section 101 of the Companies Act. Section 101(3) provides that those individuals include employees of the company, during the period of one year immediately preceding the "relevant date". Section 101(6) provides that, in section 101, "relevant date" means:

- a) In the context of a provisional liquidation, the date of the provisional liquidator's appointment; and
- b) In any other case, the commencement of the winding up. (**1**)

In many cases, the date of commencement of the winding up will be the date that the winding up petition is presented, as per section 100(2) of the Companies Act. (**1**) However,

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section 100(1) of the Companies Act does provide for an earlier commencement date (1) in the following circumstances:

- i. Where the company has been placed into voluntary liquidation; (½)
- ii. Where the fixed duration of a company has expired in accordance with its articles of association (the **Articles**); (½)
- iii. Where the Articles provide for a winding up event which has occurred; and (½)
- iv. A restructuring officer has been appointed and remains in office. (½)

Good answer!

**** 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)

The Cayman Islands Companies Winding Up Rules, 2018 (as amended) (the **CWR**) provide that every winding up petition will be supported by an affidavit sworn by the person(s) nominated for appointment as official liquidators, referred to as a "consent to act" (CWR Order. 3, rule 4).

CWR Order. 3, rule 4 sets out the required content of a consent to act from both persons nominated for appointment as official liquidator (rule 4(1)) and foreign practitioners to be appointed jointly. Although the wording of this section expressly refers to "official liquidators", that term is defined by section 89 of the Companies Act to expressly include provisional liquidators. Under CWR Order. 3, rule 4, persons nominated to act as official and/or provisional liquidators and/or their firm must comply with the insurance requirement provided by Regulation 7 of the Insolvency Practitioners Regulations (**IPRs**) (1) (O.3, r.4(1)(c)). The same requirement provided by Regulation 7 also applies to foreign practitioners, such as the chosen provisional liquidator based in Hong Kong (O.3, r.4(2)(d)) (1)

Under Regulation 7(1), a qualified insolvency practitioner will not be appointed as an official or provisional liquidator unless that person and their firm/company has professional indemnity insurance covering their negligence or non-performance as an official liquidator up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in aggregate, with a maximum deductible of US\$1 million (the **Insurance Requirement**). (1) Under Regulation 7(2), the Court can order an official liquidator to procure the relevant level of cover, in which case the premium will be paid out of the assets of the company as an expense of the liquidation.

The chosen provisional liquidator therefore does not currently comply with the Insurance Requirement, having only US\$5 million of cover in place in respect of each and every claim. (1) The chosen provisional liquidator must therefore either increase his cover to comply with the Insurance Requirement, although in that case he would have to pay the premium, or he could seek an order from the Court to increase his cover, with the premium to be paid out of the assets of the company (under Regulation 7(2)). (1)

There is also, however, a further, perhaps even more significant, issue regarding the proposed appointment of the single provisional liquidator based in Hong Kong. Regulation 8 of the IPRs specifically states that a foreign practitioner that otherwise meets the requirements of the winding up regime (including the Insurance Requirement) may be appointed by the Court as an official/provisional liquidator of a company jointly with a Cayman Islands based qualified insolvency practitioner, but not as sole official or provisional liquidator. The chosen provisional liquidator therefore cannot act as a sole provisional liquidator of SMB Tech as a Cayman Islands based company, and would instead need to be appointed jointly with a Cayman Islands based practitioner who can satisfy the requirements of O.3, r4(1), in addition to having to meet the other requirements provided in relation to foreign practitioners at O.3, r4(2) (including the Insurance Requirement).

5 marks

Question 3.2

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

The Cayman Islands Companies Act (2023 Revision) (the **Companies Act**) provides that a company petition the Court for the appointment of a restructuring officer on the grounds that the company:

- (a) is likely to become unable to pay its debts within the meaning of section 93; and (1)
- (b) intends to present a compromise or arrangements to creditors, or any class of creditors under the Companies Act, the law of a foreign country or via a consensual restructuring. (1)

2 marks

Question 3.3

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

The CWR provide that, unless otherwise directed by the Court, every petition seeking to appoint a restructuring officer (**Restructuring Petition**) must be advertised in a Cayman Islands newspaper (CWR Order 1A, rule 1(3)). (½) The form of the advertisement required is provided by CWR Form No. 3A.

Unless the Court directs otherwise, companies operating outside of the Cayman Islands are also required to advertise once in countries in which the existence of the Restructuring Petition is most likely to come to the attention of creditors (including contingent or prospective creditors) and contributories, (½) using the official language of those countries as necessary, unless otherwise directed by the Court (CWR Order 1A, rule 1(4)).

The above advertisements must appear within 7 business days after the RO Petition is filed in Court, (½) and not less than 7 business days before the hearing date (CWR Order 1A, rule 1(5)). (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)

Creditor interests can be protected by the new restructuring officer regime in a number of ways, including:

1. All Restructuring Petitions are usually heard within 21 days of presentation (CWR, Order 1A, rule 1) meaning that companies can seek quick and efficient relief while

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

protecting creditors from debtor companies that might try to delay matters. (1)

2. Once appointed, Restructuring Officers must usually report to the Court within 28 days of their appointment (CWR, Order 1A, rule 8) which is an example of the Court's close supervision in these matters in order to try to protect stakeholders, including creditors, from long, costly and/or failed restructuring efforts. (1)
3. Creditors (including contingent and prospective creditors) can apply to vary or discharge the order appointing the Restructuring Officer under the Companies Act, section 91E(1)(c), by summons (CWR, Order 1A, rule 9). The order appointing the Restructuring Officer is key in terms of defining the Restructuring Officers' powers, including the manner and extent to which such powers will modify the board of directors (Companies Act, section 91B(4) and (5)). Having an ongoing ability to potentially shape the form of the order is therefore an important tool available to creditors, such as in circumstances where wish to seek further limitations to the powers of directors in whom faith may have been lost as a result of the need to restructure. (3)
4. Creditors (including contingent and prospective creditors) can apply to remove and replace the Restructuring Officer under the Companies Act, section 91F(1)(b), by summons (CWR, Order 1A, rule 9). (4)

Given that this is a new regime, there is no direct precedent as to the specific grounds for removal, but it is expected by professionals in the industry (Course Handbook, paragraph 5.4.5.2(b) that the Court will continue to follow existing authorities on the question recently set out by Justice Doyle In the *Matter of Global Fidelity Bank, Ltd* (FSD 168 of 2021, unreported, Doyle J 20 August 2021).

5. Secured creditors have specific protection under the regime in that if security is held over the whole of part of the assets of the company, that secured creditor is entitled to enforce security without leave of the Court or reference to the Restructuring Officer. (5)
6. Creditors (including contingent or prospective creditors), also have an ongoing ability to apply to the Court to determine any question arising in the course of the restructuring under the Companies Act, section 91D(7). (6)

Excellent answer - 6 marks

Question 3.5

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

The Companies Act provides (at section 91B(3)) that on the hearing of a Restructuring Petition the Court may:

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- a) Make an order appointing a Restructuring Officer; (1)
- b) Adjourn the hearing (conditionally or unconditionally); (1)
- c) Dismiss the Restructuring Petition; (1)
- d) Make any other the Court thinks fit (1), with the exception of an order placing the company into official liquidation (1), which the Court can only make if a winding-up petition has been presented.

5 marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

The operation of ELPs is governed by the Limited Partnership Agreement (2021 Revision) and the Exempted Limited Partners Act 2021 (the **ELPA**). (1) The general rules of equity and common law (1) to partnerships as modified by the Partnership Act (2013 Revision) (1) also apply (with the exception of sections 31, 45 to 54 and 56 to 57), except where they may be inconsistent with the ELPA (section 3 of the ELPA).

Question 4.2

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

The Grand Court has jurisdiction to wind up a foreign company on the following grounds, under the Companies Act section 91 if that foreign company:

- (a) has property located in the Cayman Islands;
- (b) is carrying on business in the Cayman Islands;
- (c) is the general partner of a limited partnership;
- (d) is registered under Part IX of the Companies Act (a so-called "overseas company");
or
- (e) was incorporated elsewhere but has subsequently registered in the Cayman Islands and therefore now registered under local law.

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)

Ordinarily, judgments of a foreign court do need either to be registered under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision), or enforced by the commencement of a new action in the Cayman Islands on the basis that the foreign judgment is evidence of a debt. This is because, ordinarily, a judgment or order of a foreign court has no direct legal effect in the Cayman Islands. However, in the case of *In the matter of Guoan International Limited* (2021 2 CILR 625), Justice Kawaley held found that a foreign judgment (in that case, from Hong Kong) could be recognised as the basis for a winding up petition without first being formally enforced by the Court. Although there was little authority on the topic (see paragraph 21), the Court found the petition was entitled to a winding-up order as of right having served a statutory demand under section 93(1) of the

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

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Companies Act, which had gone unpaid (see paragraph 24).

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)**

The overarching duty of the Trustee in Bankruptcy (the **Trustee**) is to administer the estates of debtors in bankruptcy **(1)** in accordance with the Bankruptcy Act (Cap 7) (1997 Revision) (the **Bankruptcy Act**) and the Grand Court (Bankruptcy Rules) (2021 Revision) (the **Bankruptcy Rules**).

Under the Bankruptcy Act, once a provisional or absolute order in bankruptcy is made, the property of the debtor immediately passes to, and vests, in the Trustee (section 37), which allows the Trustee to carry out his or her duties. **(1)**

The following are examples of the specific powers and duties of the Trustee are provided for by the Bankruptcy Act:

- Until the provisional bankruptcy order is made absolute, it is the Trustee's duty to preserve the debtor's property in a such a state that it can be returned to the debtor in the condition in which it was seized, unless the nature of the property would render such preservation not possible (section 38); **(1)**
- The Trustee has the power to sell all or any part of the debtor's property by public auction or tender or private contract (section 78); and
- The Trustee can bring, institute or defend any action or other legal proceedings relating to the property of the debtor (section 80). **(1)**

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****

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