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

Commented [BB1]: TOTAL = 76/100 - Very well done!

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)**

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**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.

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## INSTRUCTIONS

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

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

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

## ANSWER ALL THE QUESTIONS

### QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

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

#### Question 1.1

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

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

#### Question 1.2

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

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

#### Question 1.3

Choose the **correct** statement:

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

- (a) 3

Commented [BB2]: Question 1 - Sub-total = 18/20

Commented [BB3]: The correct answer is (d)

(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.

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

**Question 1.11**

Select the **incorrect** statement:

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

**Question 1.12**

Choose the **correct** statement:

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

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

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

**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)

In relation to the proposed official liquidator's consent to act Order 3, r4(4) CWR states that every petition shall be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator stating that — (1)

- (a) that person is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5 [Insolvency Practitioner's Regulations (2023)]; (1)
- (b) having made due enquiry, that person believes that that person and that person's firm meet the independence requirement contained in Regulation 6 Insolvency Practitioner's Regulations (2023)]; (1)
- (c) that person and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7 Insolvency Practitioner's Regulations (2023)]; and (1)
- (d) that person is willing to act as official liquidator if so appointed by the Court. (1)

Note that Regulation 5 provides that the OL must be resident in the Islands; and hold a trade and business licence.

Note that Regulation 7 states that:

- (1) A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless that person and the firm of which that person is a partner or employee or the company of which that person is a director or an employee, has 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) applicable to the negligent performance or non-performance of the qualified insolvency practitioner's duties as an official liquidator generally. (
- 2) Nothing in these Regulations shall prevent the Court from making an order in respect of a particular company that its official liquidator shall —
  - (a) procure professional indemnity insurance covering the official liquidator in respect of the negligent performance or non-performance of the official liquidator's duties to the company with a limit of coverage in excess of US\$10 million in respect of each and every claim or with an aggregate limit in excess of US\$20 million; or
  - (b) procure the issue of a security bond to cover acts of fraud or dishonesty committed by the official liquidator or any of the official liquidator's staff, in which case the premium shall be paid out of the assets of the company as an expense of the liquidation

5 marks

### Question 2.2

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

Commented [BB6]: Question 2.2- Sub-total = 4/5

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)

Regulation 6 (2) of the Insolvency Practitioner's Regulations (2023) (1) states that a qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years (1) 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.

Accordingly the employees of Bodden & Ebanks would not be permitted to act as liquidator since 3 years has not elapsed since their firm acted as auditors to the Company. (1) The proposed employees will need to decline the instruction to act and notify the Court if an application has already been made. (1)

4 marks

#### Question 2.3

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

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

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

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

Using the facts above, answer the questions that follow:

#### Question 2.3.1 (1/1 mark)

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

There are no formal requirements for Tom and Jerry to act as voluntary liquidators. Section 120 of the Companies Act 2023 provides that any person, including a director or officer of the company, may be appointed as its voluntary liquidator. (1)

#### Question 2.3.2

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

Tom and Jerry must take the steps set out in section 123 of the Companies Act 2023 which provides that:

- (1) Within twenty-eight days of the commencement of a voluntary winding up, the liquidator or, in the absence of any liquidator, the directors shall —
  - (a) file notice of the winding up with the Registrar;
  - (b) file the liquidator's consent to act with the Registrar;
  - (c) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought);
  - (d) in the case of a company carrying on a regulated business, serve notice of the winding up upon the Authority; and
  - (e) publish notice of the winding up in the Gazette. **(2)**
- (2) A director or liquidator who fails to comply with this section commits an offence and is liable to a fine of ten thousand dollars.

**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 basis upon which the company may resolve to remunerate Tom and Jerry would be in accordance with Order 13, r9 provides which provides that:

- (1) 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 company may resolve to remunerate the voluntary liquidator on the basis of —
  - (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)**
- (3) The voluntary liquidator shall not be entitled to receive payment of any remuneration out of the company's assets without the prior approval of a resolution passed at a general meeting of the company except that —
  - (a) the amount of remuneration specified in the voluntary liquidator's final report and accounts may be paid if the final general meeting has been duly convened but no member attends and votes either in person or by proxy; and
  - (c) any remuneration may be paid with the Court's approval.

**Question 2.4 (2/2 marks)**

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

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 Court may make an order for the appointment of provisional liquidators at any time after a winding-up petition has been filed but before a winding up order is made.

Court powers upon the hearing of a winding-up petition is set out in section 95 which provides that:

- (1) Upon hearing the winding up petition the Court may —
- dismiss the petition
  - adjourn the hearing conditionally or unconditionally;
  - make a provisional order; or
  - any other order that it thinks fit,

#### Question 2.5

Commented [BB9]: Question 2.5 - Sub-total = 6/9

#### Question 2.5.1 (4/4 marks)

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

Section 107 Companies Act provides that an official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company.

Order 5, r6 of the CWR provide that

- An application by a creditor or contributory for an order that the official liquidator be removed shall be made by summons (referred to in this Rule as a "removal summons").
- A removal summons shall be served upon —
  - the official liquidator; and
  - each member of the liquidation committee; or
  - counsel for the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and
  - such other creditors or contributories as a Court may direct.
- A removal summons shall be supported by an affidavit containing all the facts and matters relied upon.
- A removal summons must also nominate a qualified insolvency practitioner whom the Court can appoint in succession to the removed liquidator and every person so nominated must swear an affidavit which complies with the requirements of Order 3, rule 4.
- The official liquidator shall be entitled to at least 14 days' notice of a removal summons.



- (6) An official liquidator who is removed by order of the Court shall —
- forthwith deliver to the official liquidator's successor the company's books and records and a copy of the official liquidator's liquidation files (maintained in accordance with Order 26, rule 2); and
  - within 28 days prepare a report and accounts for which purpose the official liquidator shall be allowed unrestricted access to the company's books and records

it was enunciated in *BTU Power Company* 2019 (1) CILR Note 7 and *Johnson and Deloitte & Touche AG* [1997 CILR 120] that an official liquidator can be removed in circumstances where the party applying for the removal of the official liquidator is a party with the ultimate interest in the distribution of the assets of the company.

The Court has discretion to remove the official liquidator and can do so for good reason(s). For example, in cases where it is demonstrated that there is a conflict of interest, impropriety or misconduct on the part of the official liquidator. In any event the Court will consider the removal of the official liquidator where it is satisfied that the removal will be for the advantage of the majority of the parties interested in the liquidation.

**Question 2.5.2 (2/5 marks)**

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

[Type your answer here]

**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 liquidation committee is a representative body of the company's stakeholders. In addition to the liquidation committee's primary function to set the basis and amount of the official liquidator's remuneration the committee acts as a sounding board for the official liquidator. The official liquidator will need to provide information to the committee in accordance with the Insolvency Practitioner's Regulations in order to enable the committee to consider the appropriateness of the official liquidator's actions and their resulting fees. Accordingly, any changes in the solvency of the company will need to be communicated to the committee.

The Insolvency Practitioners' Regulations deals with the remuneration of the official liquidators including the basis of remuneration.

The committee sets the official liquidator's remuneration on the following basis:

- Time spent
- percentage of distributions;

**Commented [ni10]:** You've partly answered this question in the answer above (which refers to BTU and also the principle that we're dealing with the party with the ultimate interest in the distribution of the company's assets).

You haven't tried to engage with the question on solvency, when that would be the creditors, when the contributories and why though. So only 2 marks.

**Commented [ca11]:** Question 2.6 Subtotal =0/4

- percentage of net realization
- a fixed fee; or
- a combination of the above.

Accordingly any changes in the value of the estate will impact the liquidations consideration when reviewing the official liquidator's remuneration.

Whilst the above information is correct generally concerning LCs the the above does not answer the question. For full marks the following would need to be referenced:

- As the liquidation was previously deemed to be insolvent the LC membership would have been comprised of creditors. (1 mark)
- Order 9, rule 8 (b) where a creditors claim has been paid in full the creditor(s) membership will be automatically terminated. (1 mark)
- Accordingly, the LC will need to be reconstituted and a revised certificate (CWR Form No 15) (1 mark)
- filed with the court so that the committee is comprised of not less than three, no more than five, contributories (Order 9, r.1 (3)). (1 mark)

#### Question 2.7

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

Order 22, r2 states that:

- (1) An order for dissolution shall be in CWR Form 36.
- (2) An order for dissolution shall take effect upon the date upon which it is made or such later date specified in the order.
- (3) The official liquidator shall file the order for dissolution with the Registrar of Companies within 14 days from the date upon which the order is perfected.
- (4) An order for dissolution shall include supplementary directions relating to —
  - a. the retention of the whole or part of the liquidation files for longer than the minimum period of 3 years specified in Order 25, rule 1;
  - b. the retention, storage and destruction of the company's books and records pursuant to Order 25, rule 2;
  - c. the terms upon which the official liquidator will be remunerated for acting as trustee of any unclaimed dividends or undistributed assets under section 153; and
  - d. such other consequential matters as the Court thinks fit.

**Commented [ca12]:** Question 2.7 Subtotal marks subject to D Burdette sign off

**Commented [ca13R12]:** Note this is a cut and paste from CWR. To better demonstrate your understanding you should try and answer the question in your own words.

**Commented [ca14]:** Cute and paste [Companies Winding Up Rules \(gov.ky\)](http://gov.ky)

#### Question 2.8

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

Liquidator has general investigative powers and duties under section 102(1) Companies Act 2023. If the company has failed they can investigate the causes of failure. They can investigate the promotions, business dealings and affairs of the company and make the necessary report to court if they think fit. (1)

**Commented [BB15]:** Question 2.8 - Sub-total = 3/5

There are also specific investigative powers prescribed under the Act which a liquidator can avail themselves to in order to gather information to assist them in their investigations into the company's affairs.

Liquidator can serve a section 101 notice following a wind-up order requiring persons identified in section 101(3) (e.g. directors, officers and professional service providers) to prepare and submit statements regarding the affairs of the company. However, note that professional service providers does not include auditors. (1)

Section 101 states that the statement shall be verified by an affidavit sworn by the persons required to submit it and shall show —

- (a) particulars of the company's assets and liabilities, including contingent and prospective liabilities;
- (b) the names and addresses of any persons having possession of the company's assets;
- (c) the assets of the company held by those persons;
- (d) the names and addresses of the company's creditors;
- (e) the securities held by those creditors;
- (f) the dates when the securities were respectively given; and
- (g) such further or other information that the liquidator may require.

No marks awarded as the question did not ask for you to detail the content of the affidavit

Section 103(3) allows the liquidator at any time before its dissolution to apply to the court for an order to examine any relevant person; or require the relevant person to transfer or deliver to the liquidation any company document or property. Relevant persons include persons who reside in the Islands or elsewhere. It includes persons who

- (a) has made or concurred with the statement of affairs;
- (b) is or has been a director or officer of the company;
- (c) is or was a professional service provider to the company;
- (d) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property;
- (e) not being a person falling within paragraphs (a) to (c), is or has been concerned or has taken part in the promotion, or management of the company

For the purposes of section 103(1)(c) professional service providers does not include auditors. (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 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)**

For the purposes of section 101 Companies Act the term “relevant date” means

- a. in a case where a provisional liquidator is appointed, the date of that person’s appointment; and
- b. in any other case, the commencement of the winding up **(1)**. here]

#### **Please see model answer below:**

In the context of an official liquidation (noting that this section also applies to provisional liquidators), the relevant date for the purposes of section 101 means the commencement of the winding up. **(1 mark)** In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)). **(1 mark)** However, this is subject to section 100(1), which provides that the commencement of the winding up may be an earlier date if, before the presentation of a petition for the winding up of a company by the court, a resolution was passed by the company for voluntary winding up; any period fixed for the duration of the company by the articles of association has expired; an event giving rise to a requirement to wind up the company in the articles of association has occurred; or a restructuring officer has been appointed. **(2 marks)** If any of these events occur then the winding up is deemed to have commenced at the time of the relevant aforementioned event. **(1 mark)**

**\*\* END OF QUESTION 2 \*\***

**QUESTION 3 FOLLOWS ON NEXT PAGE / ...**

**Commented [BB16]:** Question 2.9 - Sub-total = 1/5

### QUESTION 3 - CORPORATE RESCUE (20 MARKS)

Where appropriate, refer to the fact pattern below when answering the questions that follow.

#### FACT PATTERN

##### SMB TECH CORPORATION

SMB Tech Corporation (SMB Tech), a Cayman Islands-based company operating in the technology sector, boasts a global presence with subsidiaries spanning various jurisdictions, including the United States, the United Kingdom, and Hong Kong. However, SMB has recently encountered significant financial challenges stemming from an economic downturn and heightened competition within its industry. Considering these difficulties, SMB sought the advice of a reputable advisory firm, which cautioned that SMB Tech teetered on the brink of insolvency and urgently required a financial restructuring.

While exploring its strategic alternatives, SMB Tech found itself confronting mounting pressure from its creditors. One particularly assertive creditor, Tech Credit Systems (TCS), threatened to initiate winding-up proceedings against SMB Tech. In a bid to secure some respite, SMB Tech entered into a three-month standstill agreement with TCS. However, as the three-month period lapsed without concrete restructuring proposals in place, TCS exhibited signs of growing impatience.

The delay and indecision on the part of SMB Tech's management have further exacerbated tensions among certain contributories of the company. These contributories, expressing their dissatisfaction, have indicated an intent to petition the Grand Court of the Cayman Islands for the appointment of a provisional liquidator. Their chosen provisional liquidator is based in Hong Kong, and their motivation is grounded in a perceived loss of trust and confidence in SMB's directors.

SMB Tech's financial obligations include unsecured debt governed by English law, amounting to GBP 6 million, owed to three creditors situated in the United Kingdom. The company hopes to negotiate a compromise on these liabilities as part of its restructuring efforts. Additionally, SMB Tech has undertaken guarantees for certain financial obligations of several subsidiaries. Notably, the creditors holding these guarantee liabilities have indicated a reluctance to endorse any proposed restructuring scheme.

#### Question 3.1

The chosen provisional liquidator by the contributories of SMB has professional indemnity insurance up to a limit of US\$5 million in respect of each and every claim. The chosen provisional liquidator is unwilling to increase his professional indemnity liability insurance limit due to the increasing cost of insurance products in the market. Along with your

Commented [BB17]: Question 3.1 - Sub-total = 3/5

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

Per Regulation 8 (1) the foreign practitioner can be appointed by the Court as a provisional liquidator of a company to act jointly with a qualified insolvency practitioner resident in the Islands, (but not as sole liquidator), if he meets the independence and insurance requirements set out in Regulations 6 and 7 of the Insolvency Practitioners Regulations (1). A foreign practitioner need not meet the residency requirement of Regulation 5.” Furthermore, section 108(1) of the Companies Act which states that:

“A foreign practitioner may be appointed to act jointly with a qualified insolvency practitioner” (emphasis added). The terms “foreign practitioner” and “qualified insolvency practitioner” are set out in the definitions at section 89 Companies Act and states that

“‘foreign practitioner’ means 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.”

“‘qualified insolvency practitioners’ means a person holding the qualifications specified in the regulations made by the Insolvency Rules Committee under section 155 or such other qualifications as the Court considers appropriate for the conduct of the winding up of a company.

Insurance requirements are set out in Regulation 7 of the Insolvency Practitioner’s Regulations. If the liquidator does not satisfy those requirements, then he will not be appointed to act. The foreign liquidator will need to 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) applicable to the negligent performance or non-performance of the qualified insolvency practitioner’s duties as an official liquidator generally. (1)

The appointment of the provisional liquidators by the contributory is pursuant to section 104(2) Companies Act. The application may be made at any time after the presentation of a winding up petition, in order to:

- (a) prevent the dissipation or misuse of the company’s assets;
- (b) prevent the oppression of minority shareholders; or
- (c) prevent mismanagement or misconduct on the part of the company’s directors.

The contributories must demonstrate to the satisfaction of the Court that 1) there is a *prima facie* case for making a winding up order and that 2) the appointment of provisional liquidators is necessary.

The *prima facie* test can be satisfied on the balance of probabilities that the petition debt is undisputed and that the company is unable to pay its debts within the meaning of section 93 Companies Act.

There must be strong evidence that the appointment of provisional liquidators is necessary in order to prevent the misuse of company assets, oppression of minority shareholders or mismanagement / misconduct of the company’s directors.

A loss of trust and confidence is unlikely to be an acceptable grounds for presenting

the petition and so the contributories may not be able to present a petition on this ground.

3 marks – can the foreign practitioner act or not then, based on his/her insurance, there's no specific reference to the fact that the foreign practitioner only has \$5mm coverage and therefore to act he'd need to consider ramping up his coverage or seeking some form of relief under Regulation 7 (2).

### Question 3.2

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

In order to appoint a restructuring officer the company must, under section 91B(1) Companies (Amendment) Act, demonstrate that

- 1 it is or is likely to become unable to pay its debts, and (1)
- 2 (ii) intends to present a compromise or arrangement to its creditors. (1)

2 marks

### Question 3.3

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

Per Order 1A once the restructuring petition is presented, unless otherwise ordered by the Court, the petition must be advertised in accordance with Form No. 3A of CWR:

- i) Once in a newspaper circulated in the Cayman Islands; and (1/2)
- ii) In a newspaper circulated in a country (or countries) in which the petition is most likely to come to the attention of the company's creditors and contributories. (1/2)

You would have been awarded an additional mark for providing the time frames of publication ie no more than seven business days after the filing of a Restructuring Petition (1/2 mark) and not less than seven business days before the hearing date (1/2 mark).

### Question 3.4

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

1. Advertising locally and in any other country where petition is most likely to come to the attention of the company's creditors. Advertising no more than 7 business days after filing the petition and not less than 7 days before the hearing. This safeguard ensures the petition is heard on notice to the stakeholders as opposed to *ex-parte*. (1)
2. Hearing within 21 days of presentation of the petition. This safeguard ensures the

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

Commented [BB19]: Question 3.3 - Sub-total = 1/2

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

company seeks a quick and efficient relief (as opposed to abusing the regime i.e. just using get the statutory moratorium and not actually seeking restricting relief), which would prejudice creditors. (1)

3. Restructuring officer to give notice of their appointment in which the Court directs. This safeguards creditors by providing transparency regarding the company's restructuring efforts which would allow creditors to intervene (should they choose to) both before and after appointment order. (1)
4. Reporting requirements wherein the restructuring officer must report to the court within 28 days of their appointment. This safeguard from any prolonged, expensive and ultimately unsuccessful retracting efforts. (1)
5. Section 91H Companies Act provides for a creditor with security over the whole or part of the company's assets to remain entitled to enforce their security without leave of the court or without reference to the restructuring officer. (1)
6. A creditor may apply to the court for removal and replacement of a restructuring officer by summons. The summons will be served on the restructuring officer and any other creditors or contributories in accordance with the Court's directions. If removed the restructuring officer must file a report to the company's stakeholders and will be required to deliver all files relating to the company's restructuring to the successor. (1)

Excellent answer, 6 marks

#### Question 3.5

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

Section 91B provides that

The Court may, on hearing a petition under subsection (1) —

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

5 marks

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

**QUESTION 4 FOLLOWS ON NEXT PAGE / . . .**

Commented [BB21]: Question 3.5 - Sub-total = 5/5



#### QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

##### Question 4.1

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

- The Partnership Act (2013 Revision) (1)
- The Exempted Limited Partnership Act (2021 Revision) (1)
- Section 36(3) provides that Part V of the Companies Act applies to ELPs and that reference to "company" in the Companies Act includes ELPs.

and the principles of common law and equity applicable to partnerships

##### Question 4.2

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

A foreign company can be registered in the Cayman Islands under Part Xi of the Companies Act.

The Cayman court can wind up a foreign company under section 91(d) if the company:-

- has property located in the Cayman Islands
- is carrying on business in the Cayman Islands
- Is the general partner of an ordinary limited partnership or an exempted limited partnership; or
- is registered under Part IX of the Companies Act.

##### 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)

Foreign judgements have no direct legal effect in the Cayman Islands. Furthermore, the Cayman Islands is not a signatory of any international treaty for the reciprocal recognition or enforcement of foreign judgment. Moreover, although the UK has power to extend treaties (by Order in Council) to the Cayman Island by reason of the fact that Cayman is a British Overseas Territory, it has not done so.

The Foreign Judgment Reciprocal Enforcement Act (1996 Revision) (the "1996 Act") provides that foreign judgements from specified foreign courts may be registered in the Cayman Islands and enforced in the Cayman Islands in the same manner as a Cayman Islands domestic judgment. However, the 1996 Act only applies to certain Australian courts and external territories which are set out in the Foreign Judgements Reciprocal Enforcement (Australia and its External Territories Order) 1993.

Commented [BB22]: Question 4.1 - Sub-total = 2/3

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

Commented [sp24]: Question 4.3 - Sub-total = 0/3

Where the 1996 Act applies, Order 71 of the Grand Court Rules prescribes the procedural rules to follow.

In order to be enforceable in the Cayman Islands, the foreign judgement must be a final money judgement made after the 1996 Act was extended to the relevant foreign country.

Where the 1996 Act does not apply then common law principles will apply for the enforcement of foreign judgments in the Cayman Islands. The enforcement of a foreign judgement under common law usually requires commencement of a new Cayman Islands action using the foreign judgement as a cause of action (i.e. as an unsatisfied debt or other obligation).

The action must follow the procedural protocol for litigation under the Grand Court Rules. The requirements are:

- that the judgement is final
- the foreign court had jurisdiction of the judgement debtor
- the foreign judgement was not obtained fraudulently;
- the foreign judgement is not contrary to Cayman Islands public policy; and
- the foreign judgement was obtained contrary the rules of natural justice.

A successful suit will result in a summary judgement which will avail the full range of domestic enforcement remedies available in the Cayman Islands

Refer to Kawaley J's first-instance judgment in *In the matter of Guoan International Limited (unreported, 29 October 2021)* which confirms that a creditor may rely upon a foreign judgment as the basis for seeking a winding up order without first obtaining recognition and / or enforcement orders in respect of such foreign judgment from the Cayman Islands Court

#### Question 4.4

State the main statutory powers and duties of the trustee in bankruptcy, and provide at least one example with reference to a section of the Bankruptcy Act. **(4)**

In the Cayman Islands personal bankruptcy is governed by The Bankruptcy Act (Cap 7) (1997 Revision); and The Grand Court (Bankruptcy) Rules (2021 revision). Section 37 of the Bankruptcy Act provides that:

"When a provisional order has been made against a debtor, the property of the debtor shall immediately pass to and vest in the Trustee, without any conveyance, assignment or transfer whatever, to be by him in due course, either under an absolute order for bankruptcy, or under a deed of arrangement as hereinafter provided by this Law, realised, administered and distributed with as much despatch as is reasonably practicable for the benefit of the creditors."

The duty of the Trustee in Bankruptcy is set out in section 38 and states that:

"until the provisional order is made absolute, it shall be the duty of the Trustee, as far as the nature of the property seized permits, to preserve all such property in such state as to permit of its being returned to the debtor in the condition in which it was when it was seized, in the event of the revocation of the provisional order: **(1)** Provided that the Trustee may, before any such order is made absolute, make sales of any part of the debtor's stock-in-trade or other property, and take such other action in the interests of the debtor's estate, as in the ordinary

Commented [BB25]: Question 4.4 - Sub-total = 4/4

course of the debtor's business may seem expedient.”

Section 79 allows the Trustee to carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the same. (1)

Section 80 give the Trustee's power to bring or defend actions relating to the property of the debtor. (1)

Section 81 give the Trustee power to prove, rank, claim and draw dividend, in respect of any debt due to the debtor. (1)

Section 82 give the Trustee power to arbitrate or compromise claims of debtor. The Trustee may refer any dispute to arbitration, compromise all debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the debtor and any person who may have incurred any liability to the debtor, upon the receipt of such sums payable at such times and generally upon such terms as may be agreed upon.

Section 83 sets out the Trustee's power to compromise claims against debtor. The Trustee may make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the petition.

Section 84 set out Trustee's power to compromise claims as to debtor's property. The Trustee may make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the debtor, made or capable of being made on the Trustee by any person, or by the Trustee on any person.

Section 85 set out powers of Trustee as to exercising discretion or executing deeds. The Trustee may exercise any powers and discretions the capacity to exercise which is vested in the Trustee under this Law, and may execute any powers of attorney, deeds and other instruments, for the purpose of carrying into effect this Law.

Section 86 set out Trustee's power as to estates tail. The Trustee may deal with any property to which the debtor is beneficially entitled as tenant in tail in the same manner as the debtor might have dealt with the same.

Section 65 provides that once an absolute order is made that the Trustee has a duty to proceed to administer the debtor's estate for the benefit of the creditors.

**TOTAL MARKS: [100]**

**\*\* END OF ASSESSMENT \*\***