



INSOL
INTERNATIONAL



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

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

EXAMINERS

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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

Commented [BB1]: TOTAL = 92.5/100 - Excellent results, well done!

Commented [BB2R1]: Mark adjusted to 93/100

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

Choose the **correct** statement:

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

- (a) 3

Commented [BB3]: Question 1 -Sub-total = 19/20

(b) 5

(c) 6

(d) None of the above

Question 1.4

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

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

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

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

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

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

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

- (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.

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

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)**

For appointment of official liquidators, Whitesand needs to appoint a liquidation within the jurisdiction. In addition, as we know that Bluesea has a joint venture partner based in Singapore where there are potential claims exists, a foreign liquidation practitioner (IP) would likely be appointed to act jointly with the resident IP in the Cayman Islands.

Order 3, rule 4(1) of the CWR provides the content of a Consent to Act for Cayman Islands IPs:

4. (1) 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; **(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; **(1)**
 - (c) that person and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7; and **(1)**
 - (d) that person is willing to act as official liquidator if so appointed by the Court. **(1)**

Order 3, rule 4(2) of the CWR provides the content of a Consent to Act for foreign IPs:

- 4.(2) If the petition seeks an order for the appointment of a qualified insolvency practitioner jointly with a foreign practitioner, it shall be supported by an affidavit sworn by the foreign practitioner stating –
- (a) that person's professional qualifications;
 - (b) the country in which that person is qualified to perform functions equivalent to those performed by official liquidators under the Law or by trustees under the Bankruptcy Act (as amended and revised);
 - (c) that person's professional experience;
 - (d) that person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of Regulation 7;
 - (e) if that person has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company or a related party of the company, full particulars of such appointment; and
 - (f) that, having made due enquiry, that person and that person's firm meet independence requirement contained in Regulation 6.

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)

The qualified IP and his/her firm must meet the independence requirement in the Insolvency Practitioners' Regulations, Regulation 6 (1), which provides:

6. Independence Requirement

- (1) A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of a company unless that person can be properly regarded as independent as regards that company.
- (2) A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, has acted in relation to the company as its auditor. (1)

If Bodden & Ebanks acted as auditors of Bluesea in 2021, then this is within 3 years period as required in Regulation 6(2). Therefore, the proposed liquidators, being employees of Bodden & Ebanks, cannot be deemed as independent under Regulation 6(2) of the IPR, hence is not able to be appointed as IPs for the winding up of Bluesea. (1)

If the proposed liquidators are aware of the existing conflict of interest, acting as Bluesea's PL will be against the fundamental principles of ethics for IPs, particularly principle of objectivity, independence and impartiality, as well as principle of professional behavior. The proposed liquidators should follow the conceptual framework to first identify the self-interest threats that is in existence, then evaluate the threats to see if this is an acceptable level using the reasonable and informed third party test - in this case, the conflict is not at an acceptable level. Finally, the IP should address the threat by declining the appointment. In Bluesea's case, the IPs should withdraw their consents to act accordingly. (1)

4 marks

Question 2.3

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

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

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

No qualifications are needed for Tom and Jerry to act as a voluntary liquidator of the company. Section 120 of the Companies Act provides that: (1)

120. Any person, including a director or officer of the company, may be appointed as its voluntary liquidator.

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)

The statutory steps that needed to be taken are contained in s.123(1) of the Companies Act as follows:

123. Notice of voluntary winding up

(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; and²⁹³
- (e) publish notice of the winding up in the Gazette. (2)

Question 2.3.3 (2/2 marks)

Describe the basis upon which the company may resolve to remunerate Tom and Jerry in their capacity as the voluntary liquidators. (2)

The company may resolve to remunerate Tom and Jerry on basis pursuant to O.13, r.9(2) of the CWR, which provides as follows:

9. (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)

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)

Section 95(1) and (2) of the Companies Act provides for the powers of Court upon hearing a winding up petition:

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

But note that 95(1) also provides that *"the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets."*

In addition, non-petition clause is enforceable in the Cayman Islands, therefore, the Court must dismiss a petition if the articles or shareholder agreements of Cheese Limited contain any non-petition clauses:

95. (2) The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.

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)

Standing

Section 107 of the Companies Act provides that only a creditor or contributory of the

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

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

company may petition to remove OLs. This is because they are the parties with ultimate interest in the distribution of the company's assets.

107. 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.

Circumstance

To remove an official liquidator, the applicant must have good reason(s) (*BTU Power Company 2019 (1)* CILR Note 7; *AMP Enterprises Ltd (t/a Total Home Entertainment) v Hoffinan* [2002] BCC 996). Possible good reasons may include:

- conflict of interest;
- OL pursues litigation against the wishes of a creditor;
- Impropriety or misconduct (*BTU Power Company 2019 (1)* CILR Note 7);
- Failing to investigate matters such as misfeasance by former directors.

But the Court has noted that preference for another liquidator or simply creditors are being disgruntled are not sufficient reasons for removal (*BTU Power Company 2019 (1)* CILR Note 7).

The Court will also consider removing OLs if it will be for the general advantage of the majority of the persons interested in the liquidation (*Johnson and Deloitte & Touche AG* [1997] CILR 120).

Service

O. 5, r. 6 of the CWR lists the people that a removal summons application must be served on:

6. (2) A removal summons shall be served upon –
- (a) the official liquidator; and
 - (b) each member of the liquidation committee; or
 - (c) counsel for the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and
 - (d) such other creditors or contributories as a Court may direct.

In particular, note that the official liquidator shall be entitled to at least 14 days' notice of a removal summons (O. 5, r. 6(5)).

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)

In the case of an insolvent liquidation, creditors have standing to apply to remove OLs. In the case of a solvent liquidation, contributories have standing to apply for removal. It makes sense that the potential applicant varies in accordance with the solvency of the

Commented [ni10]: great answer

company because the party with legitimate interest in the distribution of the company's assets differs in these two situations.

In *Johnson and Deloitte & Touche AG* [1999] CILR 297, the JCPC opined that the reason for this distinction is that the applicant not only need to be qualified to make the application as per statute, but also needs to prove that he is a proper person with legitimate interest to make the application for removal of OLs:

*"The cases do, however, show that the courts have consistently regarded the creditors (in the case of an insolvent liquidation) and the contributories (in the case of a solvent liquidation) as the proper persons to make the application, being the only persons interested in the liquidation. Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the appellant submits, that he "has an interest in making the application or may be affected by its outcome." It means that he has a legitimate interest in the relief sought. Thus, even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see *Re Corbenstoke Ltd.* (No. 2). This case was criticized by the appellant. Their Lordships consider that it was correctly decided." (emphasis added)*

The Board continued to emphasize that in the removal application, the applicant must have legitimate interest in the relief sought in addition to having statutory qualification:

"The standing of an applicant cannot therefore be considered separately and without regard to the nature of the relief for which the application is made. Section 106(1) does not limit the category of persons who may make the application. The appellant, therefore, does not lack a statutory qualification to invoke the section, but the question remains whether it has a legitimate interest in the relief which it seeks. It is not asking the court to appoint a liquidator to fill a vacancy. It is asking the court to remove incumbent liquidators for cause. The English cases relied upon by the appellant show that an interest which is sufficient to support an application of the former kind may not be sufficient to support an application of the latter kind." (emphasis added)

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)

Commented [ca11]: Question 2.6 Subtotal = 3.5 / 4 marks

In this situation, the nature of the interest of committee members of the liquidation committee will have to change as the solvency determination made by the OLs has changed.

O. 8, r. 1 of the CWR provides that:

(5) If, and so long as the official liquidator determines that the company is solvent, the official liquidator shall convene meetings of its contributories only.

8.(c) "a contributories' meeting" shall mean a meeting of contributories convened when the official liquidator has certified that, in the official liquidator's opinion, the company should be regarded as solvent.

Therefore, the members of the liquidation committee need to consist of contributories only. And the liquidation committee members need to act in the best interest of members of the company. The voting rules at the liquidation committee (now a contributories' meeting) also changes in pursuance of O.8, r. 9(3) of the CWR.

For full marks needed to include reference to that fact that the composition of the LC must be 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)**

Upon the making of an order for dissolution, the OL's duties cease save for any residual duties preserved by the order, including for the preservation, storage and destruction of the company's remaining books and records, and dealings with unclaimed dividends.

O. 26, r. 3(4) of the CWR provides that Court needs to give directions regarding steps following making of an order for dissolution:

(4) Upon making an order for dissolution (in the case of a compulsory liquidation), the Court shall give directions in respect of the preservation, storage and destruction of the company's remaining books and records.

O. 26, r. 3(6) of the CWR provides that the cost of post-dissolution storage and destruction of a company's books and records shall be an expense of the liquidation for which provision must be made in the official liquidator's final accounts.

Unclaimed dividends and undistributed assets can be dealt with according to s.153 of the Companies Act and O.23 of the CWR, including the following aspects:

- Establishment of Trust Account (O. 23, r. 2)
- Transfer of Undistributed Assets (O. 23, r. 3)

Commented [ca12]: Question 2.7 Subtotal
5/5 marks

- Payment out of Trust Account and Transfer of Undistributed Assets (O. 23, r. 4)
- Former Liquidator's Trustee Fee and Expenses (O. 23, r. 5)
- Transfer to the Financial Secretary (O. 23, r. 6)

Following the dissolution, the OLs must retain the liquidation files in safe custody for at least 3 years (O.26, r. 2(3) and r.2(2)).

Question 2.8

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

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

The general investigative power of a liquidator is contained in section 102(1) of the Companies Act:

- (1) Where a winding up order is made by the Court, the liquidator shall be empowered 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 that person thinks fit. (1)

Pursuant to the above, where a winding up order has been made, a liquidator can require some or all of the persons identified in section 103(1) of the Companies Act to prepare and submit a statement in the prescribed form as to the affairs of the company, including any person 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, (1)

It is the duty of every relevant person to co-operate with the official liquidator.

The investigative power has been held to have been intended "to apply only to those who were involved in the company's promotion/management" (*In the Matter of ICP Strategic Credit Income Fund Limited* [2012 (1) CILR 383]). The "professional service provider" does not include auditors.

Further, upon application to the Court, the liquidators have additional investigative

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

powers pursuant to section 102(2) and (3):

(2) Subject to obtaining the directions of the Court, the liquidator shall have power to –

- (a) assist the Authority and the Royal Cayman Islands Police Service to investigate the conduct of persons referred to in section 101(3); and (1)
- (b) institute and conduct a criminal prosecution of persons referred to in section 101(3).

(3) Subject to obtaining the prior approval of the company's creditors, if it is insolvent, or its contributories, if it is solvent, the directions given under subsection (2) may include a direction that the whole or part of the costs of investigation and prosecution be paid out of the assets of the company. (1)

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)

The 'relevant date' means the commencement of the winding up. Section 101(6) provides that:

101. (6) In this section –
"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)

Usually, the commencement of the winding up is the time of presentation of the winding up petition. But note that subject to section 100(1)(a)-(d) this may be an earlier date: (1)

(1) If, before the presentation of a petition for the winding up of a company by the Court –

- (a) a resolution has been passed by the company for voluntary winding up; (½)
- (b) the period, if any, fixed for the duration of the company by the articles of association has expired; (½)
- (c) the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred; or (½)
- (d) a restructuring officer has been appointed pursuant to section 91B or 91C and the order appointing the restructuring officer has not been discharged, (½)

the winding up of the company is deemed to have commenced at the time of passing of the relevant resolution or the expiry of the relevant period or the occurrence of the relevant event or the date of the presentation of the petition to appoint a restructuring officer pursuant to section 91B. (1)

Commented [BB14]: Question 2.9 - Sub-total = 5/5

(2) In any other circumstance not specified in subsection (1), the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up.

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

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

QUESTION 3 - CORPORATE RESCUE (20 MARKS)

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

FACT PATTERN

SMB TECH CORPORATION

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

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

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

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

Question 3.1

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

Commented [BB15]: Question 3.1 - Sub-total = 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)

Regulation 7 of the IP Regulations provides the insurance requirement of liquidators:

7. Insurance Requirement (1)

(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. (1)

(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.

The chosen provisional liquidator has only insurance up to a limit of US\$5 million, which is below the Regulation 7 requirement of at least US\$10million. The chosen provisional liquidator could not be appointed by the Grand Court of the Cayman Islands. (1)

3 marks, additional marks would have been awarded for recognizing the chosen liquidator was based in Hong Kong and therefore a foreign practitioner. And that by virtue of being a foreign practitioner, the insurance requirements in Regulation 7 apply to foreign practitioners as set out in Regulation 8 of the IPRs.

Question 3.2

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

A two-limb test must be satisfied:

- (1) a company is or is likely to become unable to pay its debts as they fall due; and (1)
- (2) the company intends to present a compromise or arrangement to its creditors. (1)

The authority for how the interests of stakeholders are to be balanced and how advanced

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

a restructuring proposal must be for a company to present a RO petition is confirmed in *Re Oriente Group Limite* (FSD 231 of 2022, unreported, Kawaley J, 8 December 2022).

2 marks

Question 3.3

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

The Restructuring Petition is required to be advertised in accordance with (O.1A, r.1 of the CWR. Specifically,

- (3) Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. (½) An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.
- (4) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) (½) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).

The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court (½) and not less than 7 business days before the hearing date (½) (O.1A, r.1(5)).

Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in Court. (O.1A, r.1(6)).

Question 3.4

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

Protections built in for creditors in the new RO regime:

- (1) Application is advertised both domestically and internationally (1)
- (2) Creditors free to apply to lift the moratorium
- (3) right to be heard, nominate their own restructuring officers instead of those nominated by the company (for example, if the creditor has concerns about the independence of the company's nomination). (1)
- (4) right to apply to the Court to remove and replace the restructuring officers or vary or discharge the order appointing restructuring officers. (1)

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

Commented [BB18]: Question 3.4 - Sub-total = 4/6

- (5) a winding up petition (either before or after restructuring officers are appointed). The Court will make the decision on whether the company should be given the opportunity to pursue a restructuring or be liquidated.
- (6) Creditors with security over the whole or part of the assets will remain entitled to enforce that security without the leave of the Court and without reference to the RO. (1)

4 marks, further considerations per the below:

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

Question 3.5

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

Section 91B(3) provides that the Court may, on hearing a restructuring officer petition–

- (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)

However, note that the Court cannot make 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. (s.91B(3)(d)).

5 marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / . . .

Commented [BB19]: 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)

1. the Exempted Limited Partnership Act (2021 Revision) (1)
2. the Partnership Act (2013 Revision) (1)
3. Principles of common law and equity applicable to partnerships (s.3 ELP Act) (1)

Commented [BB20]: Question 4.1 - Sub-total = 2/3

Question 4.2

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

Section 91(d) of the Companies Act provides that the Court has jurisdiction to make winding up orders in respect of a foreign company which –

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

Part IX of the Companies Act provides that foreign company must register in the Cayman Islands where it established a place of business, or commences carrying on business within the Cayman Islands.

Commented [sp21]: Question 4.2 - Sub total = 5/5

Question 4.3

Does a judgment of a foreign court need to be registered and / or enforced within the Cayman Islands before it is relied upon as the basis for seeking a winding up order? Provide reasons. (3)

Not necessarily. If the judgment of the foreign court is a straightforward monetary judgment where there is no substantial dispute on bona fide grounds that the judgment debt is due, then it is open to the client to proceed directly to a statutory demand and appointment of a liquidator in respect of the corporate defendant, rather than seeking enforcement. However, if this is not the case and potential bona fide challenges can be raised by the company, then the judgment cannot form the basis of a winding up petition. In this situation, the winding up petition is likely to be dismissed.

Commented [sp22]: Question 4.3 - Sub total = 3/3

Question 4.4

Commented [BB23]: Question 4.4 - Sub-total = 4/4

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

1. Duty to preserve the property such that it may be returned to the debtor in the event the provisional order is revoked, until the provisional order is made absolute (s.38 of the Bankruptcy Act). **(1)**
2. Trustee may carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business (s.79 of the Bankruptcy Act). **(1)**
3. Trustee may bring or defend any legal proceedings relating to the property of the debtor (s.80). **(1)**
4. Trustee must receive and adjudicate the proof of debts (s.87 of the Bankruptcy Act) **(1)**
5. Once an absolute order has been made, the Trustee must proceed to administer the debtor's estate for the benefit of the creditors (s.65 of the Bankruptcy Act).

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****