



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 61/100

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

EXAMINERS

Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers
Ms Cassandra Ronaldson Mr Adam Crane Ms Gemma Lardner Ms Jennifer Fox
Ms Jennifer Colegate Mr Tony Heaver-Wren Mr Paul Smith Mr Spencer Vickers
Mr Benjamin Tonner

MODERATORS

Mr John Royle Mr Nicholas Fox Ms Cassandra Ronaldson
Mr Spencer Vickers Dr David Burdette

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.

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

(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 [BB3]: 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.

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

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)

Order 3, Rule 4(1) of the Companies Winding Up Rules (2023 Consolidation) (CWR) sets out that the consent to act signed by the proposed official liquidator(s) must state the following: (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)*

The consent to act must be in the form of an affidavit sworn by the person or persons nominated for appointed as official liquidator and must support the petition for winding up.

5 marks

Question 2.2

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

Order 1A, Rule 10(6) of the CWR provides that:

*"(6) A qualified insolvency practitioner may be regarded as independent notwithstanding that 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 previously provided advice to the company as financial advisor or otherwise. However, a qualified insolvency practitioner **shall not be regarded as independent if, within a period of 3 years immediately preceding the petition to appoint a restructuring officer being filed with the Court, 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.**" [emphasis added]*

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

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

Therefore, consistent with the independence requirements under Regulation 6 (1) of the Insolvency Practitioners' Regulations (2023 Regulations) (**Regulations**), liquidators are generally not regarded as independent where they have acted in relation to the respective company as an auditor within a period of three years immediately preceding the filing of the relevant winding up petition.(1)

Given that Bodden & Ebanks acted as auditors for Bluesea in 2021, there might be actual or perceived bias which render them ineligible to act under the ethical and legal obligations. Indeed, the proposed liquidators might not be able to show that they are truly independent under Regulation 6 (1), and there is a potential of conflict of interest due to the prior auditing role, which would be contrary to the Code of Ethics for Cayman Islands Institute of Professional Accountants, and in particular the principle of impartiality. Even where no actual bias could be shown to exist, the perception to bias could undermine the integrity of the liquidation process.

Accordingly, the proposed liquidators are advised to assess whether their prior role as auditors affects their ability to act impartially and disclose the potential conflict immediately to the Court and all interested parties. The proposed liquidators may choose to resign, in which they must take steps in accordance with Order 5, rule 4 of the CWR, which include preparing a report and accounts (r.4(4)-(5) and r. 2(4). They must also give notice of their resignation to the company's liquidation committee and apply to the Court for an order that they be released from the performance of any further duties. The application must be served on each member of the liquidation committee.

The Court will then need to assess whether the previous relationship between the proposed liquidators and the company will impact their ability to act objectively and fairly, and if so, may order that they be replaced. Bodden & Ebanks should take a neutral stance but they might appear and be represented and assist the court by the provision of evidence, information and neutral submissions to enable the court to come to a fair and just determination of the issue before it.

It should be noted that in *In the Matter of Global Fidelity Bank Limited (IOL)* [2021 (2) CILR 361], the Court stated that whether or not any kind of personal, professional or economic relationship and prior involvement with a company would lead to the conclusion that a practitioner could not be properly regarded as independent either in reality or in perception depended on the factual circumstances of each case. While the Court in that case considered the subjective views of all stakeholders including, where relevant, creditors and contributories, it said that those were not determinative. The Court also undertook a full and careful assessment of all the circumstances of the case and all the relevant objective factors. The Court, despite the subjective views of significant creditors, concluded that on an objective analysis no reasonable perception of lack of independence had been established.

It went on to say that when considering whether a particular personal or professional relationship would lead to a perception of lack of independence and impartiality, the court should consider the issue from the perspective of a reasonable, fair-minded and well-

informed stakeholder. The Court further stated that in some cases, previous involvement with the company might be an advantage (provided the candidate could properly be regarded as independent).

It held that the petitioners in that case, despite having prior involvement, would be appointed as joint official liquidators because the previous affiliation did not disqualify them from appointment, it was not a significant prior relationship that could reasonably cast doubt on their independence and such limited connection was not reasonably capable of impairing the appearance of impartiality and, even if it was, it was not sufficiently material to this liquidation that a fair-minded stakeholder would reasonably object to the petitioners' appointment as JOLs.

3 marks - for extra marks, candidates were hoped to come to the simple conclusion that given the proposed liquidators are employees of Bodden & Bodden, and they audited the Company within 3 years, there's no perception issues to contend or grapple with, it's a straight breach of IPR 6 (1) so they couldn't act. Also, wanted a comment along the lines of rescinding or withdrawing their previously signed consents to act, which are now not correct due to discovering the relationship.

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)

Pursuant to s. 120 of the Companies Act (2023 Revision) (**Companies Act**), "any person, including a director or officer of the company, may be appointed as its voluntary liquidator."

Therefore, Tom and Jerry do not require any qualification requirements to be appointed as voluntary liquidators. (1)

Question 2.3.2 (2/2 marks)

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

Pursuant to section 123 of the Companies Act, Tom and Jerry must notify the Registrar of their appointment and carry out the following steps within 28 days of the commencement of a voluntary winding up:

- (a) file notice of the winding up with the Registrar in the form prescribed by the Companies Winding Rules (2023 Consolidation) (**CWR**) i.e. Form 19;
- (b) file their consent to act with the Registrar (Form No. 20, CWR);
- (c) file the directors' declaration of solvency (signed by all directors) with the Registrar (if the supervision of the Court is not sought (Form No. 21);
- (d) serve notice of the winding up upon the Cayman Islands Monetary Authority, providing stamped copies of CWR Form No 19 and Form No 20; and
- (e) publish notice of the winding up in the Gazette (Form 19). **(2)**

If Tom and Jerry fail to comply with the above requirements for the notice of voluntary winding up, they will commit an offence liable to a fine of KYD 10,000.117, pursuant to s.123(2) of the Act.

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)**

Section 130 of the Companies Act stipulates the expenses of voluntary winding up as follows:

"(1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

(2) The rate and amount of the liquidator's remuneration shall be fixed and payment authorised by resolution of the company.

(3) Each report and account laid before the company in general meetings by its liquidator shall contain all such information, including the rate at which the liquidator's remuneration is calculated and particulars of the work done, as may be necessary to enable the members to determine what expenses have been properly incurred and what remuneration is properly payable to the liquidator.

(4) If the company fails to approve the liquidator's remuneration and expenses or the liquidator is dissatisfied with the decision of the company, that person may apply to the Court which shall fix the rate and amount of that person's remuneration and expenses."

As to the basis of that remuneration of liquidators, Regulation 11(1) of the Regulations relevantly provides that:

“(1) An official liquidator may be remunerated on the basis of –

- (a) the time spent by the official liquidator and the official liquidator’s staff upon the affairs of the liquidation; or*
- (b) a percentage of the amount distributed to creditors and members of the company; or*
- (c) a percentage of the amount realised upon the sale of the company’s assets (net after deduction of the direct costs of sale); or*
- (d) a fixed fee; or*
- (e) a combination of some or all of the above.” (2)*

You have provided a very comprehensive answer for 2 marks, when answering the questions use the mark as an indication of how detailed your answer should be.

Question 2.4 (0/2 marks)

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

In the course of a provisional liquidation, the Court can:

- (1) appoint a provisional liquidator under s. 104 of the Companies Act to safeguard the company’s assets (this is subject to that section and any rules made under section 155); and
- (2) stay the proceedings under s. 97 of the Act to halt any ongoing litigation against the company.

Question 2.5

Question 2.5.1 (2/4 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)

A creditor or contributory can apply to remove an official liquidator from office pursuant to section 107 of the Act, a.

The Court will typically approve such an order in cases where there is misconduct, incapacity, or a conflict of interest.

The application must be served on the liquidator, the company and any other party the Court deems appropriate.

Commented [BB8]: Question 2.4 - Sub-total = 0/2

Commented [ni9]: this question asks what the Court's powers are 'upon the hearing of a **winding up petition**' not upon the hearing of a PL application. Therefore you have not answered the question correctly I'm afraid.

Commented [BB10]: Question 2.5 - Sub-total = 3/9

Commented [ni11]: To be eligible for the 4th mark we were looking for a reference to CWR O.5, r.6

Commented [ni12]: This is incorrect. Under CWR O.5, r.6

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

Question 2.5.2 (1/5 marks)

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

It makes sense that the class of potential applicant varies in accordance with the solvency of the company in order to protect interests i.e. different stakeholders are affected differently by a company's solvency status. In addition, it ensures that the parties most impacted will have a say in the liquidation process/proceedings.

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 change will mean a redefinition of the liquidation committee's role, in that the focus may shift from creditor representation to overseeing asset distribution.

There is also a potential dissolution as the LC might be dissolved if its purpose is deemed served.

References should have been made as follows:

- As the liquidation was previously deemed to be insolvent the LC membership would have been comprised of creditors.
- Order 9, rule 8 (b) where a creditors claim has been paid in full the creditor(s) membership will be automatically terminated.
- Accordingly, the LC will need to be reconstituted and a revised certificate (CWR Form No 15)
- 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)).

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 dissolving a company, the official liquidator's duties as officeholder cease. Therefore, they will no longer hold certain duties and powers, apart

Commented [ni13]: You haven't really gotten to grips with this question.

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

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

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

One mark awarded for correctly identifying that the class of applicants varies with who is most impacted by the liquidation.

Commented [ca14]: Question 2.6 Subtotal 0/4

Commented [ca15]: Question 2.7 Subtotal - 2/5

for any residual duties preserved by the order for dissolution (including for the preservation, storage and destruction of the company's remaining books and records, and dealings with unclaimed dividends). An order for discharge of the liquidators is often included in the order for dissolution.

Commented [ca16]: 2 marks

The residual duties will include asset realization i.e. liquidating the company's assets, settling creditor claims and payment, preparing final accounts and reports and completing the legal dissolution process.

Whilst the court has the power to order supplementary powers ordinarily an OL will not apply to dissolve the company if there are assets to be realised and claims to be settled. A final report would also be prepared and sent to the relevant stakeholders ahead of a dissolution application being filed.

Question 2.8

Commented [BB17]: Question 2.8 - Sub-total = 5/5

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

The liquidator is empowered to gather information necessary to assist and facilitate their investigations into a company and its affairs. As an officer of the Court, the liquidator is required to *"make himself thoroughly acquainted with the affairs of the company; and to suppress nothing, and to conceal nothing, (1) 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"* (*In the Matter of Citrico International Limited* [2004-05 CILR 435]). (1)

The general investigative powers and duties of a liquidator are set out in section 102(1) of the Companies Act, which provides that the liquidator is 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 the liquidator thinks fit."* (1)

Pursuant to s. 102(2) of the Act, subject to obtaining directions of the Court, the liquidator also has the power to: *"(1) assist the Cayman Islands Monetary Authority and the Royal Cayman Islands Police Service to investigate the conduct of persons referred to in s. 101(3) of the Act; and (2) institute and conduct a criminal prosecution of persons referred to in s. 101(3)."* (1)

The persons referred to in s. 101(3) are discussed below.

Section 102(3) provides that the the liquidator is also empowered to include in the directions given under s. 102(2), that the whole or part of the costs of the investigation and prosecution be paid out of the assets of the company. However, this is subject to obtaining the prior

approval of the company's creditors, if it the company is insolvent, or its contributories, if it is solvent.

Power to require a statement of affairs

Pursuant to s. 101(1), where the Court has made a winding up order or appointed a provisional liquidator, the liquidator is empowered to serve a s. 101 notice requiring some or all of the persons mentioned in s. 101(3) to prepare and submit a statement in the prescribed form as to the affairs of the company.

The persons listed in section 101(3) from whom a statement of affairs can be required are as follows:

- (a) existing or former directors or officers of the company;
- (b) existing or former professional service providers to the company; and
- (c) existing or former employees of the company, during the period of one year immediately preceding the relevant date. *(1)*

However, in respect of professional service providers listed at category (b) above, the decision in *In the Matter of ICP Strategic Credit Income Fund Limited* [2012 (1) CILR 383] indicated that such persons will not include auditors, since they are deemed to be independent and do not provide general administrative services to companies. The decision therefore highlights that the investigative power of the liquidator is intended "to apply only to those who were involved in the company's promotion/management".

Order for examination

Pursuant to s.103(3), while a company is being wound up, a liquidator may at any time before the dissolution apply to the Court for an order for the examination of any relevant person, or that a relevant person transfer or deliver up to the liquidator any property/documents belonging to the company.

Under s. 103(1), a "relevant person" includes any person who, whether resident in the Cayman Island or elsewhere:

- "(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."*

Therefore, an order for examination under section 103 extends to relevant persons resident outside of the Cayman Islands. However, as mentioned in the section above, as set out in

relation to section 101(3), section 103(1)(c) does not include auditors.

Possession, collection and entry to Property

A liquidator is empowered to take possession of, collect, access or control of all of the company's books and records, including those maintained in electronic form is enshrined in Sch 3, Part II, para 1 of the Act and CWR, O 26, r 3.

Under, s. 138, the Court may require any person, who has in their possession any property or documents to which the company appears entitled, to pay, transfer or deliver such property or documents to the official liquidator. However, this provision is to be used solely for the purpose of the liquidation and for the discharge of the official liquidator's statutory functions.

Conclusion

The investigative duties and powers therefore scope asset tracing, financial review, creditors claims assessment and reporting to keep stakeholders informed.

You have provided a lot of unnecessary information in your answer. Please try and keep your answer specific to the question.

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 requirement to prepare and submit a statement of affairs (in the prescribed form) as stipulated under section 101(1) of the Companies Act, relates to "persons who are or have been employees of the company, during the period of one year immediately preceding the relevant date", pursuant to s. 101(3)(c).

Section 101(6) provides the definition of "relevant date" for the purposes of a section 101(3)(c) notice as follows:

"(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."

Therefore, in cases where a provisional liquidator has been appointed, the relevant date is the date of the appointment of the provisional liquidator. In the context of official liquidation, the relevant date will in many cases be the date of the presentation of the winding up

Commented [BB18]: Question 2.9 - Sub-total = 4/5

petition. (1)

However, pursuant to s. 100(1), the relevant date will **may** be earlier (1) if, before the presentation of a petition for the winding up of a company by the Court, any of the following has occurred:

- (i) a resolution was passed by the company for voluntary winding up; (½)
- (ii) the period, if any, fixed for the duration of the company by the articles of association has expired; (½)
- (iii) the event giving rise to a requirement to wind up the company in the articles of association has occurred; or (½)
- (iv) a restructuring officer has been appointed, then the winding ups deemed to have commenced at the time of the relevant aforementioned event. (½)

**** 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 [BB19]: Question 3.1 - Sub-total = 0/5

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

The chosen PL could be appointed for the following reasons:

1. Insurance adequacy - to consider whether the US\$5million is sufficient given the company's size, complexity, etc.
2. Risk assessment - to evaluate if the limit poses a risk to the liquidation process.

Ultimately, the Court will decide if the limit is acceptable.

0 marks - suggested answer is below

The chosen provisional liquidator of SMB by contributories is based in Hong Kong and would therefore be deemed a foreign practitioner. (1 mark)

Foreign practitioners are permitted to be appointed as official liquidators, but they must be appointed jointly with a qualified insolvency practitioner per section 108 (1) of the Companies Act (2023 as revised). (1 mark)

In addition, the Insolvency Practitioners Regulations (IPRs). In particular regulation 8 states that:

A foreign practitioner who meets the independence and insurance requirements of Regulations 6 and 7 of the IPRs may be appointed by the Court as an official liquidator of a company jointly with a qualified insolvency practitioner (but not as sole official liquidator). A foreign practitioner need not meet the residency requirement of Regulation 5. (1 mark)

The insurance requirements contained within regulation 7 of the IPRs states (amongst other things):

A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless he and the firm of which he is a partner or employee or the company of which he is 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\$100,000) applicable to the negligent performance or non-performance of his duties as an official liquidator generally. (emphasis added). (1 mark)

Therefore, if the chosen liquidator by the contributories of SMB isn't prepared to or cannot increase his professional indemnity insurance from US\$5 million per each and every claim to US\$10 million per each and every claim - then he would be unable to act as an official liquidator. (1 mark)

Question 3.2

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

Commented [BB20]: Question 3.2 - Sub-total = 2/2

Section 91B(1) of the Companies Act provides as follows:

"Appointment of a restructuring officer

91B.(1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company –

- (a) is or is likely to become unable to pay its debts within the meaning of section 93; (1) and
- (b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring." (1)

The Company must therefore demonstrate the need for a Restructuring Officer by showing that the company is facing insolvency and is therefore under financial strain and that the restructuring will better serve creditor interests than liquidation.

2 marks

Question 3.3

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

Order 1A, Rule 1(3) to (5), CWR sets out the formal advertisement requirements for a restructuring petition as follows:

- "(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) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (½) (in which case the advertisement must be published in the official language of such country or countries).*
- (5) 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)*

Therefore, the default position is that a restructuring petition will be heard on notice to stakeholders.

Notwithstanding the above formal advertisement requirements, it should be noted that the Court has demonstrated some flexibility in respect of advertisements, where in [*In re Midway Resources International*](#), FSD 51 of 2021, judgment dated 30 March 2021 (unreported) it allowed dispensation with the formal advertising requirements on the basis that the Company had directly notified all unsecured creditors of the petition, its

Commented [BB21]: Question 3.3 - Sub-total = 2/2

contents and the hearing date, 7 calendar days before the hearing. Justice Segal accepted that the actual notice given to each creditor through an emailed circular was in real world terms more effective notice than would have been achieved through strict compliance with the advertising requirements.

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. Oversight - supervising the restructuring process.
2. Creditor protection - ensuring that credit claims are treated fairly.
3. Formulation of Restructuring Plan - assisting with the development of a plan that works. (1)
4. Compliance - ensuring adherence to legal requirements.
5. Transparency - ensuring clear communication with stakeholders (1)
6. Financial assessment - evaluating the financial status of the company.

2 marks, other considerations per the below

Any 6 of the following

- There are a number of provisions which prescribe specific notice and reporting requirements for the benefit of creditors. (1 mark)
- The default position is that a Restructuring Petition will be heard on notice to stakeholders while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made *ex parte* by default. (1 mark)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint JPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- The ROs must report within 28 days of appointment (1 mark)
- A creditor or contributory may apply for an order discharging the appointment (1 mark)
- Secured creditors remain entitled to enforce their security. (1 mark)

Question 3.5

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

Appointing a restructuring officer (1) and staying the proceedings.

Commented [BB22]: Question 3.4 - Sub-total = 4/6

Commented [BB23]: Question 3.5 - Sub-total = 1/5

1 mark - the question is looking for what the Court can or cannot grant/order at the RO hearing, the following would have got full marks.

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

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

The Exempted Limited Partnership Act (2021 Revision) (1) and relevant sections of the Companies Act, dealing with dissolution, although the ELP Act will prevail where there are any inconsistencies. and the principles of common law and equity applicable to partnerships (1 mark) as modified by the Partnership Act (2013 Revision). (1 mark)

Commented [BB24]: Question 4.1 - Sub-total = 1/3

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 the Cayman Islands court with jurisdiction to make a winding up order in respect of a foreign company (as defined by s.183) in circumstances where the foreign company:

- (i) has property located in the Cayman Islands;
- (ii) is carrying on business in Cayman;
- (iii) is the general partner of a Cayman limited partnership (or an ELP); or
- (iv) is registered as a foreign company under Part IX of the Companies Act (and in particular, s. 186).

Commented [sp25]: Question 4.2 - Sub total = 4/5

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)

Commented [sp26]: Question 4.3 - Sub total = 0/3

[The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides that foreign judgments given in specified foreign courts may be registered in the Cayman Islands and enforced in the same manner as a domestic judgment of the Cayman Islands Court. However, the legislation applies only to certain courts of Australia and its external territories as stipulated in the Foreign Judgments Reciprocal Enforcement (Australia and its External Territories Order) 1993.

Order 71 of the Grand Court Rules provides the relevant procedure in circumstances where the Act applies

A foreign judgment registered under the abovementioned Act can be set aside on an application of any party against whom a registered judgment may be enforced.

Practice Direction No.1 of 2018 deals with court-to-court communications and co-operation in cross border insolvency and restructuring cases. Specifically, the PD states that Cayman office holders should promote consider whether to incorporate some or all of the Guidelines defined as (1) the American Law Institute/International Insolvency Institute Guidelines applicable to Court-to-Court Communications in Cross-Border Insolvency Matters and (2) the Judicial Insolvency Network Guidelines for Communication and Co-operation between Courts in Cross-Border Insolvency Matters into an international protocol to be approved by the Court.

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)

Commented [BB27]: Question 4.4 - Sub-total = 2/4

Power to hold Property upon a provisional or absolute order being made (s.37) and administer the estates of debtors in bankruptcy subject to the Bankruptcy Act. (1)

Preserve the property such that it may be returned to the debtor in the event the provisional order is revoked. (1)

And see sections 79, 80, 87, 65. For further marks you need to expand on this answer and explain what these sections contain. For example see below:

The 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 (section 79).

The Trustee may bring or defend any legal proceedings relating to the property of the debtor (section 80).

The Trustee must receive and adjudicate the proof of debts (section 87).

Once an absolute order has been made, the Trustee must proceed to administer the debtor's estate for the benefit of the creditors (section 65).

They must also report as soon as possible after the close of the public examination of the debtor, as to the state of the debtor's affairs and as to the conduct of the debtor before and during the bankruptcy.

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****