



INSOL
INTERNATIONAL



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

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

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

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.

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Commented [BB2]: Question 1 - Sub-total = 19/20

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

Choose the **correct** statement:

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

- (a) 3

(b) 5

(c) 6

(d) None of the above

Question 1.4

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

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

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

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

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

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

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

- (d) Within 7 days of the appointment.

Question 1.7

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

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

Question 1.8

Choose the **correct** statement:

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

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

Question 1.9

Choose the **correct** statement:

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

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

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

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

Question 1.11

Select the **incorrect** statement:

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

Question 1.12

Choose the **correct** statement:

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

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

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

Question 1.13

Select the **correct** statement:

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

Question 1.14

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

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

Question 1.15

Select the **correct** statement relating to the appointment of inspectors:

- (a) The report of an inspector can be used in any legal proceeding as evidence of the opinion of the inspectors.

- (b) Upon the appointment of an inspector the directors' powers will automatically cease.
- (c) Upon the appointment of an inspector there is a stay of proceedings such that a winding up application cannot be brought.
- (d) Only CIMA has the power to appoint an inspector.

Question 1.16

Select the **correct** statement relating to exempted limited partnerships (ELPs):

- (a) Limited Partners have an unfettered statutory right to petition the court to wind up the relevant ELP / General Partner.
- (b) Where there are inconsistencies in relation to the dissolution of ELPs, the ELP Act will take priority over the Companies Act.
- (c) An ELP is required to have more than one limited partner.
- (d) An ELP formed under the Exempted Limited Partnership has a separate legal personality.

Question 1.17

Select the **correct** statement:

Which of the following statements in relation to informal workouts pursuant to the Cayman Islands law is correct:

- (a) The restructuring officer regime is an example of an Informal workout process under Cayman Islands law.
- (b) A stay of proceedings is not available in the Cayman Islands for informal creditor workouts.
- (c) A qualified insolvency practitioner is required to oversee an informal workout under the Insolvency Practitioners Regulations.
- (d) Under Cayman Islands law, any new financing advanced during an informal creditor workout will be provided with priority status in the event the company is later liquidated.

Question 1.18

Choose the **correct** statement:

Which of the following statements is true regarding a provisional liquidation application?

- (a) The company has the statutory power to commence the proceedings.
- (b) There is a worldwide moratorium (stay) upon the presentation of the provisional liquidation application.
- (c) A winding up petition must be presented as a precursor to the application for the provisional liquidation.
- (d) Following the implementation of restructuring officer regime, a company can no longer seek the appointment of a provisional liquidator if it intends on presenting a restructuring proposal.

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

Question 1.19

Select the **correct** statement:

An official liquidator can set aside dispositions that seek to prefer one creditor over other creditors within how many months / years before the deemed commencement of the company's liquidation.

- (a) Three months
- (b) Six months
- (c) Six years
- (d) There is no time limit

Question 1.20

Select the **correct** statement:

Which of the following is **not a** fundamental principle of ethics for Insolvency Practitioners per the Cayman Islands Institute of Professional Accountants:

- (a) Conflicts of interest
- (b) Integrity
- (c) Confidentiality
- (d) Professional behaviour

**** END OF QUESTION 1 ****

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

Where appropriate, refer to the fact pattern below when answering the questions that follow. Please note that not all questions relate to the fact pattern.

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

Bluesea Digital Capital Limited (Bluesea) was established in 2018 in the Cayman Islands as a digital asset management platform. Bluesea operated multiple online cryptocurrency trading platforms across the Caribbean and Latin America, known as OTPs. Investments made into these OTPs were held in secure brokerage accounts under Bluesea's own name. Bluesea's clientele comprised a diverse mix of institutional investors, high-net-worth individuals, and consumers.

On 24 June 2022, one of Bluesea's prominent OTPs, eTrade Wave (eTrade), abruptly disabled its buy / sell functionality without prior notice. At the time of suspension, eTrade had amassed over 2,500 users who had collectively invested approximately \$125 million. This sudden suspension of the trading platform created widespread apprehension among investors, resulting in an overwhelming surge of withdrawal requests. Notably, Whitesand Capital (Whitesand) sought to withdraw its entire deposit of \$32 million but faced insurmountable challenges in recovering the funds.

Unable to retrieve its deposit, Whitesand initiated winding up proceedings against Bluesea in May 2023. The petition faced vehement opposition from Bluesea, which asserted that deposits had been transferred to its joint venture partner. Bluesea claimed it needed additional time to resolve a "cordial disagreement" to facilitate the return of deposits. Amid allegations that investor deposits had not been segregated as promised and due to Bluewave's inability to meet its financial obligations, the Grand Court of the Cayman Islands saw fit to make a winding up order on 22 August 2023.

Following the appointment of the official liquidator, Bluesea's joint venture partner, based in Singapore, became the subject of several press reports. These reports alleged that its director had previously been involved in a fraudulent investment scheme in the early 2000s. Furthermore, the official liquidator had discovered that only one audit had ever been conducted in respect of Bluesea's financial statements, with Bluesea's auditors resigning shortly thereafter.

The official liquidators have called for creditor claims, and among the submissions received, a claim amounting to \$0.5 million has surfaced, relating to leasing obligations tied to office space that was utilised by the joint venture partner. Bluesea's documented records fail to substantiate any historical evidence of rental payments being disbursed by the company, nor do they reveal any corresponding liabilities recorded within its financial statements.

Question 2.1

As part of Whitesand's petition to wind up Bluesea, Whitesand obtained sworn consent(s) to act from the proposed official liquidators. Set out the required content of the consent to act signed by the proposed official liquidator(s). (5)

The content of the proposed official liquidators' consent to act is set out at Order 3, rule 4 of the Companies Winding Up Rules (2023 Consolidation) ("CWR") and requires a sworn affidavit by the proposed liquidators stating: (1)

- They are a qualified insolvency practitioner and meet the residency requirement contained in Regulation 5; (1)
- Having made due enquiry, that person believes that that person and that person's firm meeting the independence requirement contained in Regulation 6; (1)
- That person and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7; and (1)
- that person is willing to act as an official liquidator if so appointed. (1)

The a sworn consent must be provided for each proposed liquidator. Should one of the proposed liquidators be a foreign practitioner, the foreign practitioner shall provide additional information related to interalia professional competency and experience as set out at Order 4, rule 3 (2) of the CWR.

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)

The proposed liquidators are subject to the IESBA Code of Ethics (the "Code") as dictated by the Cayman Islands Institute of Professional Accountants ("CIIPA"). These standards provide the fundamental principles for proposed liquidators and their conduct. The Code seeks to provide guidance on business relationships which could potentially impair a liquidator's ability to comply with the fundamental principles. In this instance, the auditing relationship was within the last three years and the potential appointment is official rather than voluntary. In this instance, the proposed liquidators are prohibited from accepting the appointment as official liquidators of Bluesea.

Dependent on the current stage of the process, the proposed liquidators should withdrawal their consents (1), refuse the appointment or resign the appointment in accordance with the provisions of Order 5 of Companies Winding Up Rules (2023

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

Commented [BB5]: Question 2.2 - Sub-total = 1/5

Consolidation).

1 mark - we're expecting candidates to point out the independency requirements under the IPRs (regulation 6) and provide commentary around that. See below:

Unfortunately based upon this new information coming to light, the proposed liquidators put forward by Whitesand would not be able to act as official liquidators. (1 mark)

Regulation 6 of the Insolvency Practitioners Regulations set out the independency requirements (1 mark) and state:

A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of a company unless he can be properly regarded as independent as regards that company.

A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, he, or the firm of which he is a partner or employee, has acted in relation to the company as its auditor. (1 mark)

In this scenario the winding up petition date is in May 2023, the proposed liquidators or their firm have acted as auditors within the 3 years immediately preceding the commencement of the liquidation, given Boddan & Ebanks Limited acted as auditors as recently as 2021 the proposed liquidators would not be regarded as independent. (1 mark)

In respect of the already provided consents to act, they should be withdrawn and rescinded as a matter of urgency. (1 mark)

Question 2.3

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)

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

Section 120 of the Companies Act (2023 Revision) states that any person may be appointed as the voluntary liquidator of a company. (1)

Question 2.3.2 (2/2 marks)

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

Section 123 of the Companies Act (2023 Revision) states that within 28 days of appointment a voluntary liquidator must:

- File notice of the winding up with the Registrar;
- File the liquidator's consent to act with the registrar;
- File the director's declaration of solvency (if the supervision of the court is not being sought)
- In the case of a company carrying on regulated business, serve notice of the winding up on the Cayman Islands Monetary Authority; and
- 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 basis of the voluntary liquidator's remuneration is set out at Order 13, rule 9 (2) of the Companies Winding Up Rules (2023 Consolidation) ("CWR") which states that the company may resolve to remunerate the voluntary liquidator on the basis of:

- Hourly rates for time reasonably incurred on the liquidation;
- A fixed sum;
- A percentage of the assets distributed or realized; or
- A combination of the above 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)

According to Section 95 of the Companies Act (2023 Revision) the court may do the following upon the hearing of the winding up petition:

- Dismiss the petition;
- Adjourn the hearing (conditionally or unconditionally);
- Make a provisional order;
- Make any other order it sees fit.

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

It is noted that the court may not refuse a winding up order on the sole ground that the assets of the company (i) have been mortgaged or (ii) charged to an amount equal to or in excess of the assets or (iii) the company has no assets.

Question 2.5

Commented [BB8]: Question 2.5 - Sub-total = 7/9

Question 2.5.1 (4/4 marks)

Commented [ni9]: Great answer

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)

Two pieces of statutory legislation are applicable to the removal of an official liquidator, being Section 107 of the Companies Act (2023 Revision) and Order 5 of the Companies Winding Up Rules (2023 Consolidation) ("CWR").

Case law has established that the only either a creditor or contributory may apply to the court to remove an official liquidator by way of a removal summons.¹ Which party has standing to apply to the Court turns on which group is the relevant stakeholder to in the liquidation i.e. in a solvent liquidation the contributories and in an insolvent liquidation the creditors. In addition to an application to the Court, Order 5 rule 6 (5) of the CWR dictates that the removal summons is required to be served on the following parties:

- The official liquidator;
- Each member of the liquidation committee;
- Legal counsel for the liquidation committee; and
- Any other creditors or contributories as directed by the court.

Generally, the Court will consider the removal of an official liquidator if it is determined to be for the advantage of a majority of the relevant stakeholders of the liquidation.² The Court has broad purview to remove an official liquidator and may grant the remove order for a number of reasons, including but not limited to:³

- If the official liquidator has a conflict of interest;
- If the official liquidator pursues litigation against the wishes of a creditor;
- Impropropriety;
- Misconduct; or
- Failing to investigate relevant matters.

Question 2.5.2 (3/5 marks)

Commented [ni10]: I think you've understood the principles, but 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).

It was also looking for a reference to *BTU Power Company* (which is cited in the course notes under section 4.2.6.2 removal).

¹ Johnson and Deloitte & Touche AG [1997 CILR] and BTU Power Company 2019 (1) CILR Note 7

² Johnson and Deloitte & Touche AG [1997 CILR]

³ BTU Power Company 2019 (1) CILR Note 7

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 standing to apply to remove an official liquidator is varies is accordance with the solvency of the company aligns with the principle established in Order 8, rule 1 of the Companies Winding Up Rules (2023 Consolidation) to identify the relevant stakeholders in the liquidation and thus those persons who are impacted by the decisions and actions of the official liquidator. Furthermore, this also aligns with the composition of any liquidation committee in the liquidation which has been established to provide guidance in the liquidation and represent the interests the entire body of relevant stakeholders (i.e creditors or contributories).

Question 2.6

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

As detailed in Order 9, rule 3 (2) of the Companies Winding Up Rules (2023 Consolidation)(“CWR”) the liquidator will do the following to reconstitute the liquidation committee to align with the facts and circumstances of the liquidation:

- Any creditor members of the liquidation committee will automatically cease to members; and
- Convene a meeting of the contributories for the purpose of electing new members from the contributories.

Order 9, rule 3 (4) of the CWR states indicates that the above meeting may be convened in anticipate of the change in solvency i.e. in respect of an expected but not realized recovery.

For full marks need to reference that the reconstituted LC will be 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)

Order 23 of the Companies Winding Up Rules (2023 Consolidation) following the making of a dissolution order the liquidator must:

Commented [ca11]: Question 2.6 Subtotal 3.5/4

Commented [BB12]: Question 2.7 - Su-total = 1/5

- Become the trustee of any unclaimed assets for the benefit of creditors or contributories, as applicable (O 23, r 1);
- Establish a trust account in an interest bearing account representing unclaimed dividends or uncles checks. (O 23, r 2);
- Transfer any remaining assets of the company to the liquidators as trustee of the creditors or members, as applicable. (O 23, r 3);
- Attempt to payout the assets within the trust accounts to the appropriate party. (O 23, r 4);
- Settle a reasonable fee out of the assets held in trust for the services provided and fees incurred in administering the trust (O 23, r 5); and
- Following a period of one year from dissolution transfer any remaining assets to the financial secretary and prepare a report (O 23, r 6).

Commented [ca13]: 1 mark

Please see the model answer below as a reference:

Upon the making of an order dissolving a company, the official liquidator's duties as officeholder cease save for any residual duties preserved by the order for dissolution, including for the preservation, storage and destruction of the company's remaining books and records, and dealings with unclaimed dividends. An order for discharge of the liquidators is often included in the order for dissolution.

Following the dissolution of a company, the liquidator shall retain the liquidation files in safe custody for at least 3 years pursuant to O.26, r.2(3) of the CWR. Upon making an order for dissolution, the court shall give directions in respect of the preservation, storage and destruction of the company's remaining books and records pursuant CWR O.26, r.3(4) and in accordance with r.3(6), the cost of post-dissolution storage and destruction of a company's books and records shall be an expense of the liquidation for which provision must be made in the official liquidator's final accounts.

Question 2.8

Commented [BB14]: Question 2.8 - Sub-total = 4/5

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

Section 102 of the Companies Act (2023 Revision) provided the liquidator with the powers of general investigation. As an officer of the court (1) the liquidator is required to be "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, (1) which is material to ascertain the exact truth in every case"⁴ From Section 102 the liquidator is empowered to investigate:

- If the company has failed, the causes of the failure; and
- Generally, the promotion, business dealings and affairs of the company. (1)

Section 102 of the Companies Act (2023 Revision) provides for the liquidator to seek directions of the court to:

⁴ Gooch's Case 1872, 7 Ch App 207, applied in the Cayman Islands in the Matter of *Citrico International Limited* [2004-05 CILR 435].

- Assist the Cayman Islands Monetary Authority and the Cayman Islands Police Service to investigate the actions of any relevant person (as defined in section 101 (3)); and **(1)**
- Conducted a criminal prosecution of relevant persons. **For an additional mark, your answer should include who those persons are that you refer to: These persons include existing or former directors or officers of the company; (b) professional service providers to the company; and (c) employees of the company, during the period of one year immediately preceding the relevant date. (2 marks)**

Question 2.9

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

Following the making of a winding up order or the appointment of a provisional liquidator section 101 of the Companies Act (2023 Revision) deals with obtaining a statement of affairs, as required by the liquidator.

Section 101 (3) details the persons described in section 101(1) as:

- Persons or are or have been directors of the company;
- Persons who are or have been professional services providers to the company; and
- Persons who are or have been employees of the company, during the period one year preceding the relevant date.

The relevant date above is defined in section 101(6) as:

- Where a provisional liquidator has been appointed, the date of appointment; or
- In any other case, the commencement of the winding up. **(1)**

Your answer has not addressed the question, please see the model answer below:

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

Commented [BB15]: Question 2.9 - Sub-total =1/5

has been appointed. **(2 marks)** If any of these events occur then the winding up is deemed to have commenced at the time of the relevant aforementioned event. **(1 mark)**

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

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

QUESTION 3 - CORPORATE RESCUE (20 MARKS)

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

FACT PATTERN

SMB TECH CORPORATION

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

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

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

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

Question 3.1

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

Commented [BB16]: 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)

Section 108 (1) of the Companies Act (2023 Revision) (1) and Insolvency Practitioner Regulations (2023 Revision) ("IPR") regulation 8 notes that a foreign official liquidator may only be appointed to act jointly with a qualified insolvency practitioner (1). As such, the chosen provisional liquidator must meet the eligibility requirements, including the residency requirement, as set out in the IPR, regulations 4 -7. Assuming that the preceding requirements are satisfied, the proposed liquidator may not be appointed unless regulation 7 of the IPR establishes that a qualified insolvency practitioner must maintain insurance of up to USD 10 million for each claim and USD 20 million in the aggregate is complied with. (1)

Commented [jo17]: The residency requirement is expressly excluded for foreign practitioners

3 marks - see comments / answer below

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 contributors 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)

In order to appoint a restructuring officer the company must demonstrate that it:

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

- Is or is likely to become unable to pay its debts; and (1)
- Intended to present a compromise or arrangement to its creditor or classes thereof. (1)

As defined at section 91B (1) of the Companies Act (2023 Revision)

2 marks

Question 3.3

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

Order 1A, rule , (2)-(3) of the Companies Winding Up Rules (2023 Consolidation) defines two requirements for advertising a restructuring petition:

- Advertising the Cayman Islands Gazette within business days of the ordering being made; and (1/2)
- Notice shall be provided to the company's creditors (including contingent and prospective), contributories and the Cayman Islands Monetary Authority, if the company is as directed by the court.

Your answer must include the following: in a newspaper having circulation in a country (or countries) in which the petition is most likely to come to the attention of the company's creditors and contributories (1/2 mark) no more than seven business days after the filing of a Restructuring Petition (1/2 mark) and not less than seven business days before the hearing date (1/2 mark).

Question 3.4

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

There are numerous provisions of the restructuring officer regime as detailed in Section 91 of the Companies Act (2023 Revision) which seek to protect the interest of creditors, including but not limited to:

- Restructuring petitions should be heard within 21 days of presentation to prevent abuse of the moratorium period (CWR O 1A, r 1); (1)
- A qualified IP must properly independent of the company in order to be appointed;
- The restructuring officers must report to the court within 28 days of appointment (CWR O 1A, r 7); (1)
- A creditor may appear at the hearing of the restructuring petition to oppose or support the petition provided the prescribed criteria are met (CWR O 1A, r 3); (1)
- A creditor may apply to the court to vary or discharge the appointment of restructuring officer (91 E and 91 F); and (1)

Commented [BB19]: Question 3.3 - Sub-total = 0.5/2

Commented [BB20]: Question 3.4 - Sub-total = 5/6

- A creditor's security will remain intact, without leave of the court, following the appointment of a restructuring officer. (91 H) (1)

5 marks

Question 3.5

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

The relief available to the court is detailed at section 91E (3) (a)-(e) of the Companies Act (2023 Revision) and states the court may:

- Vary the order appointing the restructuring officer; (1)
- Discharge or continue the order appointing the restructuring officer; (1)
- Adjourn the hearing conditionally or unconditionally; (1)
- Dismiss the application or (1)
- Make any other order as the court thinks fit (1), except placing the company into official liquidation.(1)

5 marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

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

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

In addition to the Limited Partnership Agreement (1) ("LPA"), Cayman Islands' exempted limited Partnerships ("ELPs") are governed by the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision) ("ELP Act"). As per the ELP Act the principles of common law and equity are applicable to ELPs. (1)

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

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 (2023 Revision) notes the Cayman Islands court has jurisdiction to wind up a foreign company if the foreign company:

- Has property located in the Cayman Islands;
- Is carrying on business in the Cayman Islands;
- Is the general partner or ordinary limited partnership or an exempted limited partnership; or
- Is registered under Part IX of the Companies Act (2023 Revision).

Commented [sp23]: 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)

A foreign judgement does not 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. Under common law a foreign judgement can establish a debt against the judgement debtor and therefore serve as the basis of a creditor's winding up petition. That judgement need not be enforced nor registered so long as the common law rules outlining the recognition of foreign judgements are satisfied.

Commented [sp24]: Question 4.3 - Sub total = 2/3

Question 4.4

Commented [BB25]: Question 4.4 - Sub-total = 3/4

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

The duties and powers of the trustee in bankruptcy are detailed in the Bankruptcy Act (1997 Revision)(the “Bankruptcy Act”) and can be broadly categorized by (i) duties and powers prior to the provisional order being made absolute and (ii) duties and powers subsequent to the provisional order being made absolute.

Prior to the provisional order being made absolute the Trustee must preserve the property of the debtor such that if the provisional order is rejected the debtor’s property may be returned. **(1)** This can be done by the trustee:

- Carrying on the trade and business of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business; **(1)**
- bringing or defending legal proceedings with respect to the property of the debtor; **(1) section 80 of the Bankruptcy Act.**
- receiving and adjudicating proof of debts in accordance with the provision of the Grand Court (Bankruptcy) Rules 2021. **(1)**

Following the absolute order being made, it is then the trustee’s duty to administer the debtor’s estate for the benefit of the creditors.

You have given enough examples, however for full marks you need to make reference in one of your examples to the relevant section of the Bankruptcy Act, see above.

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****