



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 73/100 - 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

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 = 17/20

(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.

Commented [BB5]: The correct answer is (b)

Question 1.18

Choose the **correct** statement:

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

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

Question 1.19

Select the **correct** statement:

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

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

Question 1.20

Select the **correct** statement:

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

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

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

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

Question 2.1

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

In accordance with the Companies Winding Up Rules O.3, r.4, every petition for an order to appoint official liquidators will be supported by a sworn affidavit. The affidavit should state: (1)

1. Residency -The person is a qualified Insolvency practitioner and meets the residency requirement. (1) The residency requirement is set out in the Insolvency Practitioners Regulations - Rule 5 which states that the person must be resident in the Cayman Islands and the person or the firm that the person works for holds a trade and business licence authorising them to work as an IP.
2. Independence -The person must meet the independence requirements. (1) The requirements are set out in the Insolvency Practitioners Regulations - Rule 6 which states that the person should be regarded as independent of the Company, and is not considered independent if within a period 3 years prior the person or the firm has acted in relation to the Company as an Auditor
3. Insurance -The person and/or firm must have insurance in line with the Insolvency Practitioners Regulations - Rule 7 (1)
4. The person is willing to act as an official Liquidator should they be appointed by the Court. (1)

There are also specific requirements for Foreign IP, including Residency, Qualification, Independence, Insurance and appointments they have previously taken.

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 consent to act; what should the proposed liquidators do in respect of the same? (5)

In accordance with Rule 6 (2) of the Insolvency Practitioners Regulations states (1)

Independence Requirement

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

Commented [BB6]: Question 2.1 - Sub-total = 5/5

Commented [BB7]: Question 2.2 - sub-total = 2/2

(1)

Accordingly, this requirement states that the IP should not be considered if within 3 years immediately prior to the commencement of the liquidation, the IP and/or their firm has acted in relation to the Company as its Auditor.

If the information came to light after the proposed liquidators had already consented, they will need to advise the court of this matter as in IPR Rule 6 (1) the court cannot appoint an IP unless that person can be properly regarded as independent. (1)

3 marks, model answer below to show mark allocation

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

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

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

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

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

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

Question 2.3

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.

Commented [jo8]: And has that happened based on the question, you've failed to comment

Commented [BB9]: Question 2.3 - Sub-total = 5/5

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)

According to S120 of the Companies Act, any person can be appointed as a voluntary liquidator. There are however no qualifications required to be an appointed voluntary liquidator. Any person including a director or officer of the Company may be appointed.

(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)

On appointment as Voluntary Liquidators the following must be undertaken within 28 days:

1. File a notice of the winding up with the registrar
2. File the Liquidators Consent to act with the Registrar
3. File the Declaration of Solvency with the Registrar (if a supervision order is not sought)
4. Serve notice of the winding up on CIMA if the company is carrying on a regulated business
5. Publish the notice of winding up in the Cayman Islands 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)

To remunerate Tom and Jerry as the voluntary liquidators of the Company, as per s 130(2) of the Companies Act, and Companies Winding Up Rules (As Amended), O13, r.9 the rate and the amount of the remuneration shall be fixed and any payment must be authorized by a resolution of the Company.

The company can state in the resolution to remunerate them on various basis including:

1. An hourly rate
2. A fixed sum
3. A commission or percentage of the assets distributed or realized
4. A combination of any of these

Any remuneration from the assets of the company must be approved at a general meeting of the company except if the final AGM has been held, and no member attends or if the Court has approved.

The account from the Liquidator must be presented in the Company's functional currency

and include the amount of the remuneration. (2)

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)

A contributory is not entitled to present a winding up petition under S94(3) of the Companies Act, but if the contributories do present a winding-up petition to the Court, on a just and equitable basis, the court is able to make the alternative orders

1. Regulate the conduct of the company's affairs in the future.
2. Order the company to abstain from doing or continuing to do the action that was complained to by the petitioner.
3. Authorise civil proceedings to be brought in the name of and on behalf of the company by the petitioner.
4. An order to provide for the purchase of the shares of any members of the company, reducing the company's capital.

Question 2.5

Question 2.5.1 (4/4 marks)

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

In accordance with s 107 of the Companies Act an official liquidator can be removed by order of the court made on application of a creditor (Insolvent liquidation) or contributory (solvent liquidation) of the Company. This is accompanied by an affidavit. Either the creditor or the contributory must have an ultimate interest in the distribution of the assets to be able to do this.

An Official Liquidator can be removed for various reasons and the court has discretion to do this, with good reason. Some of the reasons would be conflict of interest, misconduct, and failure to investigate such as actions against directors.

The Companies Winding Up Rules (As Amended) O5, r.6 states that a removal summons and affidavit will need to be served upon the following people;

1. The official liquidator - must be given at least 14 days notice of the removal summons
2. Each member of the liquidation committee
3. Lawyers for the Liquidation committee, if it has one
4. Other creditors or contributories as advised by the court

This summons must nominate a quailed IP who the court can appoint in their place and

Commented [BB10]: Question 2.4 - Sub-total = 0/2

Commented [ni11]: yes it is. This section only specifies some cases in which contributories cannot bring petitions

Commented [ni12]: I'm afraid this question was seeking an answer on what the court's powers are to make any order in relation to a WUP (i.e. s.95(1)), not what *alternative* orders a court could make if it considers that the company should be wound up on the J&E basis.

Commented [BB13]: Question 2.5 - Sub-total = 5/9

Commented [ni14]: good answer

they in turn must sign an affidavit in line with the Consent to Act process.

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)**

Under Schedule 2 of the Companies Act it lists the Categories of preferred debts and how it is distributed. The ranking and type of creditors determine when they get paid. Any distribution to unsecured creditors for their claim in the liquidation is ranked pari passu and is subject to the priorities as listed. Shareholders are ranked below unsecured creditors.

Knowing which class the applicant creditor will be in can determine for them where they rank in any potential distribution.

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)**

If the estate is to receive enough funds to settle all outstanding creditor claims in full there would be no need for the creditors to be part of the liquidation committee.

Under O.9, r.3 of the Companies Winding Up Rules (As Amended), if during the course of the liquidation, the company's solvency is changed the liquidator can then change the committee. In the case mentioned above, the creditors of the committee would automatically cease to be members and the liquidator would call a meeting of the contributories and would look to elect new members amongst the contributories.

For full marks needed to reference that the newly reconstituted LC will be comprised of not less than three, no more than five, contributories (Order 9, r.1 (3)). (1 mark)

Question 2.7

Commented [ni15]: This answer doesn't really get to grips with the question, which 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).

See s.4.2.6.2 of the course notes.

Commented [ca16]: Question 2.6 Subtotal = 3.5/4

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

Once the affairs of the Company have been wound up and the liquidation is to be completed the liquidator must publish the final report and accounts and apply for the company to be dissolved.

In accordance with Order 22, Rule 2, the liquidator will file the CWR36 with the Registrar of Companies within 14 days from the date upon which the order is actioned.

A hearing date will need to be obtained so that a final report and accounts can be prepared for all creditors, which will contain all relevant information.

If there are any unclaimed dividends or assets, these will need to be dealt with.

Following dissolution, the liquidator will need to note and retain the records of the liquidator must be retained for longer than three years and how those of the Company will be dealt with. This will be covered in the liquidator's Final report and accounts.

Question 2.8

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

Section 102(1) of the Companies Act gives the official Liquidators powers to investigate the company's financial affairs and try to determine what caused it to fail. (1)

It is the duty of a liquidator to collect, realise and distribute the assets of the company to its creditors.

The Liquidator would look to bring legal proceedings on behalf of and in the name of the Company. There are also offences against both the Company and the Director that need to be investigated. (½)

Some of the actions that the liquidator can investigate are;

1. Voidable preference (s145 of the Companies Act)
This enables the liquidator to set aside transactions that give preference of one creditor over another within 6 months of the commencement of the liquidation. This would be at a time when the company is unable to pay its debts as they fell due.
2. Fraudulent trading
The liquidator would look at any business of the Company that has been carried out with the intent to defraud creditors of the company.
3. Transfer of assets at undervalue (s146)
This enables the liquidator to look at any assets that were disposed of either sold or transferred for no payment or sold at below value. This is depriving the creditors of monies that could potentially be paid to them.

Schedule 3, Part 1 of the Companies Act also outlines the powers that can be used with the sanction of the court, with Part 2 being powers that can be used without the sanction of the Court.

Some Part 1 powers include the power to bring or defend any action, carry on the business of the company, and dispose of any property.

Commented [ca17]: Question 2.7 Subtotal
5/5

Commented [BB18]: Question 2.8 - Sub-total
= 1.5/5

Please see suggested memo to this question:

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

Question 2.9

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

A liquidator can require persons that they have identified to complete and submit a statement of Affairs. These persons can be directors or officers of the Company, professional providers, e.g. accountants, auditors, lawyers, or employees of the company during the period of one year immediately preceding the relevant date.

The "relevant" date referred to in S 101 of the Companies Act is the date a year prior to the date of when the liquidator was appointed or the commencement of the liquidation in the case of an official liquidation (1). This date could also be the date that the winding-up petition was presented. (1) this is the presentation of the winding up petition (pursuant to section 100(2))

The date, in accordance with s 100 (1) could also be,

1. The date a resolution was passed by the Company (½)
2. The period of the expiry of the duration of the company in its articles (½)
3. Any other event provided for in the articles (½)
4. If a restructuring office was appointed and not discharged (½)

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

Commented [BB19]: Question 2.9 - Sub-total = 4/5

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 [BB20]: 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)

Under Regulation 7 of the IPR, it states that a liquidator can only be appointed if they or their firm have professional indemnity insurance up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in the aggregate, with a deductible of not more than US\$1 million) applicable to the negligent performance or non-performance of the qualified insolvency practitioner's duties as an official liquidator generally. (1)

As the unsecured debts for the Company amount to GDP 6 million, then his insurance does not cover his liability let alone the requirement to have US\$10 as per the regulations. The US\$5 million also does not cover his negligence performance if there are any. The court could only appoint him as a liquidator if he could confirm that he or his firm was in compliance with the insurance requirement in the regulations or be able to provide to confirm that he would have the benefit of the professional indemnity insurance as per the regulations. (1)

The Court could make an order that the liquidator get professional indemnity insurance as required in the regulations and also an order issuing a security bond to cover any acts committed by the liquidator and the premium for the insurance to be paid out as an expense of the Company out of its assets. (1)

3 marks - creditor claims have nothing to do with IPR 7, it's referring to insurance claims. Candidates should also have made reference to the chosen liquidator being based in Hong Kong and therefore a foreign practitioner. IPR 8 should have been referenced, as that's how IPR 7 applies to foreign practitioners. Model answer below for your review.

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)

Before the court will appoint a restructuring officer, the Company must demonstrate, in accordance with Section 91B (1) of the Companies Act that it is likely to become unable to pay its debts (1) and it also intends to present a compromise or an arrangement to its creditors. (1)

2 marks

Question 3.3

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

Under Order 1A, r.1(6) a petition for the appointment of a restructuring office shall be advertised once in a newspaper in the Cayman Islands (½) on CWR form 3A. If the company is carrying on business outside of the Cayman Islands the petition is to be advertised once in the countries that it operated in so that any potential creditors of the Company can see. (½)

The advertisement is to appear not more than 7 business days after the filing of the petition (½) and not less than 7 business days after the hearing date. (½)

Question 3.4

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

Six of the elements of the new restructuring officer regime that assist in safeguarding the interest of creditors

1. Advertising the petition prior to the order ensures that all stakeholders are aware even if outside the jurisdiction. (1)
2. Creditors have a right to be heard at the petition and have the option to vote in favour of or against the proposed restructuring. (1)
3. Moratorium on creditor claims - Creditors with security over the assets of a company may continue to take steps to enforce their security, provided that those steps do not require the commencement of legal proceedings against the

Commented [BB21]: Question 3.2 - Sub-total = 2/2

Commented [BB22]: Question 3.3 - Sub-total = 2/2

Commented [BB23]: Question 3.4 - Sub-total = 4/6

company. (1)

4. Creditors can make an application for the Moratorium to be lifted.
5. Creditors can seek leave to bring a winding up petition against the company
6. Creditors can apply to have the RO appointment set aside and the powers of the RO waived (1)

4 marks, plus any of the below would have been acceptable

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

Question 3.5

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

The court can upon hearing the petition;

1. Appoint the RO (1)
2. Adjourn the hearing conditionally or unconditionally (1)
3. Dismiss the petition all together (1)
4. Make another order that it may deem fit (1)

The court is unable to put the Company into Official liquidation. (1)

5 Marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

Commented [BB24]: 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)

As well as the Limited Partnership Agreement an ELP is also governed under the Partnership Act (2013 Revision) (1) and The Exempted Limited Partnerships Act (2021 Revision). (1) and the principles of common law and equity applicable to partnerships (1 mark) ELPs can also be governed under Part V of the Companies Act.

Commented [BB25]: Question 4.1 = Sub-total = 2/3

Question 4.2

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

Under Section 91 (d)The Cayman court has jurisdiction to wind up a foreign company in the Cayman Islands in the following circumstances.

1. Where the company has property located in the Cayman Islands
2. The company is carrying on business in the Cayman Islands
3. Where the Company is a general partner of a limited partnership
4. Where the Company is registered as a foreign company under part IX of the Companies Act

Commented [sp26]: 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)

In accordance with the Reciprocal Enforcement Act, a judgment creditor can apply to register a foreign judgment in the Cayman Islands. Once the judgment has been registered, a foreign judgment is deemed to have the same force and effect as if it were originally made by the Grand Court of the Cayman Islands.

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

Commented [sp27]: Question 4.3 - Sub total = 0/3

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 [BB28]: Question 4.4 - Sub-total = 3/4

The Trustee is appointed under the Bankruptcy Act to administer the estate of debtors in bankruptcy.

The Trustee must preserve any property belonging to the debtor in the event that the order is revoked. (1) **Section 38 of the Act** If the Debtor is trading, then the trustee must continue to trade on as necessary for the best outcome for the sale of the business. (1) **Section 79**

Any Proof of debts must be adjudicated by the Trustee and administer the estate for the benefit of these creditors. (1) **Section 87**

Under Part III 13 (1) of the Bankruptcy Act, the trustee has the power, with the approval of the court to appoint a person to act as his agent.

Other main statutory powers and duties of the trustee include:

Until the provisional order is made absolute, it is the duty of the Trustee to preserve the property such that it may be returned to the debtor in the event the provisional order is revoked (section 38 of the Act).

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

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).

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****