



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 87/100 -
Excellent results, 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
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MODERATORS

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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 = 18/20

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.

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

Question 1.14

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

(a) An official liquidator acts in *quasi*-judicial capacity in respect of the adjudication of claims, meaning that the liquidator's determination will be final and is not capable of dispute.

(b) A proof of debt is always required in order for an official liquidator to adjudicate on a creditor's claim.

(c) Only creditors with a contractual right to interest have an entitlement to interest.

(d) A valid contract (agreed between the company and the creditor) can have the effect of changing the otherwise statutory ranking of that creditors' claim, such that the claim is subordinated.

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

Question 1.15

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

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

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

Question 1.16

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

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

Question 1.17

Select the **correct** statement:

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

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

Question 1.18

Choose the **correct** statement:

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

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

Question 1.19

Select the **correct** statement:

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

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

Question 1.20

Select the **correct** statement:

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

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

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

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

Question 2.1

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

The required content of the consent to act is set out in Order 3, Rule 4(1) of the Companies Winding Up Rules (2023) ("CWR"). It requires that every petition is supported by an affidavit sworn by the person(s) nominated for appointment as official liquidators and includes the following statements by them (1):

- Residency - They are qualified insolvency practitioners and meet the residency requirements contained in Regulation 5. (1)
- Independence - They have made due enquiry and believe that both they and their firm meet the independence requirement contained in Regulation 6. (1)
- Insurance - They and/or their firm are in compliance with the insurance requirement contained in Regulation 7. (1)
- Appointments - They are willing to act as official liquidator(s) if so appointed by the Court. (1)

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 unable to act as liquidators of Bluesea. (1)

In accordance with Regulation 6(2) of the Insolvency Practitioners' Regulations ("IPR"), a qualified insolvency practitioner is not regarded as independent if, within a 3-year period of immediately preceding the commencement of the liquidation, (1) they, or the firm of which they are a partner or employee, has acted in relation to the company as its auditor. Given that Bodden & Ebanks Limited ("B&E") acted as auditors of Bluesea in 2021 (noting that only 1 audit has been historically completed) and the winding up order is dated 22 August 2023 (i.e. date of commencement of the liquidation), there is a breach of Regulation 6(1) of the IPR (1) and, therefore, the proposed liquidators will not be properly regarded as independent irrespective of the fact that they were unaware of the prior auditing engagement / relationship at the time of submitting their consents to act.

Given the above conflict of interest, the proposed liquidators should inform the Court of the change in circumstances and withdraw their consents to act (1) or, otherwise, recuse

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

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

Commented [jo7]: Not detrimental or disastrous to your answer, but just be careful the commencement date would typically be the date of presentation of the petition.

themselves from any involvement with the liquidation. If already appointed (per the winding up order), the Court can take steps to remove and replace the proposed liquidators to continue the winding up process.

4 marks

Question 2.3

Commented [BB8]: Question 2.3 - Sub-total = 5/5

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

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

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

In accordance with Section 120 of the Companies Act (2023 Revision), any person, including a director or officer of the company, may be appointed as its liquidator. Therefore, Tom and Jerry do not require any specific qualifications. (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)

In accordance with Section 123 of the Companies Act (2023 Revision), Tom and Jerry must complete the following actions within 28 days of their appointment:

- File a notice of the winding up with the Registrar.
- File the liquidators' consent to act with the Registrar.
- File the director's declaration of solvency with the Registrar (if the supervision of the Court is not sought).
- Serve notice of the winding up upon the Authority (if Cheese Limited is carrying on a regulated business).
- Publish notice of the winding up in the Cayman Islands Gazette. (2)

In accordance with Section 124 of the Companies Act (2023 Revision), Tom and Jerry

must apply to the Court for an order that the liquidation continue under supervision of the Court if a signed declaration of solvency has not been received within 28 days of the commencement of the liquidation.

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)

In accordance with Section 130(2) and (3) of the Companies Act (2023 Revision), the rate and amount of Tom and Jerry's remuneration shall be fixed and payment authorized by resolution of the company from members at general meetings.

In accordance with Section 130(4) of the Companies Act (2023 Revision), if the company fails to approve Tom and Jerry's remuneration and expenses or they are dissatisfied with the decision of the company, Tom and Jerry may apply to the Court which shall fix the rate and amount of their remuneration and expenses. (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)

Given that contributories are petitioning, the Court has the power to wind-up the company on just and equitable grounds in accordance with Section 92(e) of the Companies Act (2023 Revision).

In accordance with Section 95(1) of the Companies Act (2023 Revision), the Court has the following powers upon the hearing of a winding up petition:

- Dismissing the petition;
- Adjourning the hearing conditionally or unconditionally;
- Making a provisional order; or
- Any other order that it thinks fit (Section 95(3) of the Companies Act (2023 Revision) may be relevant here, given the contributories have petitioned).

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 Section 107 of the Companies Act (2023 Revision), an official liquidator may be removed from office by order of the Court made on the application of a

Commented [BB9]: Question 2.4 - Sub-total = 2/2

Commented [BB10]: Question 2.5 - Sub-total = 8/9

Commented [ni11]: great answer

creditor (in the case of an insolvent liquidation) or contributory (in the case of a solvency liquidation) of the company. This is provided that the creditor or contributory is the only party with the ultimate and legitimate interest in the distribution of the company's assets (per *Johnson and Deloitte & Touche AG* [1997 CILR 120] and *BTU Power Company* 2019 (1) CILR Note 7).

In accordance with Order 5, Rule 6(1) and (3) of the CWR, to remove an official liquidator, a creditor or contributory must apply to the Court for the relevant orders by way of a summons (known as a Removal Summons) supported by an affidavit setting out all the facts and matters relied upon in relation to the removal application. It must also nominate a successor (qualified insolvency practitioner) for the liquidator being removed.

In accordance with Order 5, Rule 6(2) and (5) of the CWR, the removal summons must be served upon the: (i) official liquidator (they must be given at least 14 days' notice of a Removal Summons); (ii) each member of the liquidation committee; (iii) counsel for the liquidation committee (if applicable); and (iv) any other creditors or contributories as directed by the Court.

Question 2.5.2 (4/5 marks)

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

In accordance with Section 94(b) and (c) of the Companies Act (2023 Revision), any creditor or creditors (including any contingent or prospective creditor or creditors) or any contributory or contributories may present a petition for the winding up of a company.

A creditor or creditors will typically bring a winding up petition on the grounds that a company is unable to pay its debts (i.e. grounds of insolvency), noting that shareholders generally cannot apply on these grounds, because if the company is insolvent, such shareholders will no longer have any economic interest in the company (i.e. if there are inadequate funds to pay creditors, there will be no residual funds to pay shareholders in accordance with the statutory distribution priority).

On the other hand, a contributory or contributories (particularly minority contributories) will typically bring a winding up petition on just and equitable grounds. It generally occurs where there is a dispute between the contributories themselves, or a dispute between contributories and management, which results in a loss of trust and confidence. For the reasons highlighted above, such applications will rarely be brought in respect of an insolvent company as the petitioning contributory will need to demonstrate to the Court that they have an economic interest in the company in order to have the appropriate standing to petition (i.e. company has to be solvent - there will be a surplus of assets after payment of debts and expenses of the winding up). These petitions usually rely on: (i) loss of substratum; (ii) deadlock; (iii) mismanagement; and/or (iv) exclusion from management.

Commented [ni12]: you've got most of the way there. You seem to understand who gets what when, and you've referenced BTU above.

The reason you haven't been awarded full marks here is that the way you've answered this question doesn't focus on who may bring an OL removal application. You've reverted back to WUPs for some reason. So it's not clear you've understood the question entirely, and you therefore haven't answered it as cogently and clearly as is required for the full 5 marks.

Overall, selecting the class of applicant based on solvency should ensure that the stakeholders with the most significant economic interests and rights are given the appropriate opportunity to influence relevant decisions and pass resolutions on the future of the company.

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)

In accordance with Order 9, Rule 3(1) of the CWR, given that there has been a change in the company's solvency, the official liquidator should take steps to reconstitute the liquidation committee.

In accordance with Order 9, Rule 3(2) of the CWR, if the company is certified to be solvent, any creditor members of its liquidation committee automatically cease to be members and the official liquidator shall convene a meeting of contributories for the purpose of electing new members from amongst the company's contributories.

In circumstances where it is not possible to reconstitute the liquidation committee, the Court may retrospectively sanction a waiver of the requirement to have a liquidation committee.

Question 2.7

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

Upon the making of an order for dissolution, the official liquidator's duties as officeholder cease except for any residual duties specified in the order for dissolution, which may include the following:

- Order 25, Rule 1 of the CWR - Determining the retention of the whole or part of the liquidation files for longer than the minimum 3-year period.
- Order 25, Rule 2 of the CWR - Determining the retention, storage and destruction of the company's books and records. Upon making an order for dissolution, the Court must give directions in respect of this pursuant to Order 26, Rule 3(4) and (6) of the CWR.
- Section 153 of the Companies Act (2023 Revision) and Order 23 of the CWR - The terms upon which the liquidator will be remunerated for acting as trustee of any unclaimed dividends or undistributed assets (if applicable).
- Any other consequential matters as the Court sees fit.

Commented [ca13]: Question 2.6 Subtotal - 4/4 marks

Commented [ca14]: Question 2.7 Subtotal 3/5 marks

Commented [ca15]: 1 mark

Commented [ca16]: 1 mark

Commented [ca17]: 1 mark

Question 2.8

Describe the general investigative powers and duties of a liquidator.

(5)

Commented [BB18]: Question 2.8 - Sub-total = 1/5

The general investigative powers and duties of a liquidator include:

- Tracing, collecting and realizing assets of the company and, if there is a surplus, distributing these assets (in cash or in specie) to its creditors and/or contributories.
- Reporting to the Court, the company's creditors / contributories as well as any other relevant stakeholders in relation to the affairs of the company and the manner in which it has been wound up.
- Obtaining and examining the company's books and records to understand the company's financial position.
- Conducting examinations of the company's officers, employees and other relevant stakeholders to obtain information on the company's operations and historical financial position and performance. (1) In the case of the liquidation of Bluesea, the liquidators can conduct an examination of Bluesea's directors and management to determine why investor deposits were transferred to the Singapore-based joint venture partner and why this information was not communicated to investors, noting that investments into OTPs were intended to be held in brokerage accounts under Bluesea's name. The liquidators can also query the extent of due diligence performed on Singapore-based joint venture partner, noting its director's historical involvement in fraudulent investment schemes. Following these examinations, the liquidators may have claims of gross negligence against the directors and management.
- Conducting investigations into transactions and, where appropriate, commencing legal proceedings to recover any antecedent / voidable transactions identified (e.g. preferential payments to creditors). In the case of the liquidation of Bluesea, the liquidators can investigate and pursue a claim regarding the uncommercial arrangement in which the Singapore-based joint venture partner used a leasing space at the expense of Bluesea in circumstances where Bluesea had not derived any apparent benefit from the arrangement and had not recorded any corresponding amount in its financial statements.
- Seek foreign recognition of Cayman Islands laws in other jurisdictions. In the case of the liquidation of Bluesea, such recognition in Singapore may be necessary to pursue any claims against the Singapore-based joint venture partner.
- Where appropriate, the liquidator can seek directions from the Court on procedural and other matters.

Schedule 3, Part 1 of the Companies Act (2023 Revision) details the powers exercisable by liquidators with sanction of the Court.

Schedule 3, Part 2 of the Companies Act (2023 Revision) details the powers exercisable by

liquidators without sanction of the Court.

Please see the model answer 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)**

Pursuant to Section 101 of the Companies Act (2023 Revision), provisional liquidators may require certain persons to furnish statements as to the affairs of the company.

In accordance with Section 101(6) of the Companies Act (2023 Revision), "relevant date" refers to: (i) the date of the person's appointment in the case where a provisional liquidator is appointed; or (ii) the commencement of the winding up in any other case **(1)**. In many cases, the "commencement of the winding up" is taken to be the date on which the winding up petition was presented, pursuant to section 100(2). **(1)** However, subject to Section 100(1) of the Companies Act (2023 Revision), this may be an earlier date if, before the presentation of the petition: **(1)** (i) a resolution was passed for the voluntary winding up of the company; **(½)** (ii) any period fixed for the duration of the company's life per the memorandum and articles of association ("M&AA") has expired; **(½)** (iii) an event giving rise to a requirement to wind up the company in the M&AA has occurred; or **(½)** (iv) a restructuring officer has been appointed, **(½)** then the winding up is taken to have commencement at the time of the relevant event mentioned from (i) to (iv). **(1)**

In this regard, for the purposes of a Section 101 of the Companies Act (2023 Revision) notice, the statement of affairs can only be requested from: (i) directors or officers of the

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company; (ii) professional service providers to the company (excluding auditors); and (iii) employees of the company within the 1-year period preceding the relevant date (as defined / explained above).

**** 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 [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)

The nominated provisional liquidator cannot be appointed by the Grand Court of the Cayman Islands for the following reasons: (1)

- Their professional indemnity insurance limit falls below the minimum requirement stipulated in Regulation 7 of the IPR. Given they are unwilling to increase this limit, they will not be permitted to act as liquidator. (1)
- They are not licensed to act as an insolvency practitioner in a "relevant country". The relevant countries are defined in Regulation 4 of the IPR and does not include Hong Kong (i.e. where the nominated liquidator is licensed).
- They do not satisfy the residency requirement as they reside in Hong Kong and not the Cayman Islands per Regulation 5 of the IPR.
- There is no indication that the nominated provisional liquidator will be jointly appointed with a qualified insolvency practitioner. Given they are likely acting as a sole provisional liquidator, they do not satisfy Regulation 8 of the IPR. A foreign practitioner cannot act as a sole liquidator of a Cayman Islands company. (1)

Given SMB Tech's financial obligations include unsecured debt governed by English law (GBP 6 million to 3 creditors situated in the United Kingdom), there should be regard to the economic interest of these creditors especially in circumstances where SMB Tech is or is likely to be insolvent and, therefore, the contributories seeking to petition for the appointment of provisional liquidators may have no economic interest (given there will be inadequate funds in a liquidation to provide them with any return per the statutory distribution priority). The Court will have regard to the comparative economic interests of creditors and contributories.

3 Marks - for extra marks candidates were expected to quote the required insurance amounts per Regulation 7, and interlink Regulation 7 applying to foreign practitioners by virtue of the wording in Regulation 8.

Question 3.2

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

In accordance with Section 91B(1) of the Companies Act (2023 Revision) (with reference to the Companies (Amendment) Act and Companies Winding Up (Amendment) Rules), a company may present a petition to the Court on the grounds that: (i) it is likely to become unable to pay its debts; (1) and (ii) it intends to present a compromise or arrangement to its creditors (generally known as a restructuring plan). (1)

2 marks

Commented [jo21]: The residency requirement doesn't apply to foreign practitioners, read the the carve out in Regulation 8 of the IPRs

Commented [BB22]: Question 3.2 - Sub-total = 2/2

Question 3.3

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

The restructuring plan is required to be advertised in accordance with Form No. 3A of the CWR.

In accordance with Order 1A, Rule 1(3) and (4) of the CWR, the advertisement must occur: (i) once in a newspaper having circulation in the Cayman Islands; (½) and (ii) in a newspaper having circulation in a country or countries in which the petition is most likely to affect the company's creditors and contributories. (½)

In accordance with Order 1A, Rule 1(6) of the CWR, the advertisements are required to appear no more than 7 business days after the filing of the petition (½) and not less than 7 business days before the hearing date. (½)

Commented [BB23]: Question 3.3 - Sub-total = 2/2

Question 3.4

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

1. The restructuring moratorium on creditor claims does not bind secured creditors, meaning they may continue to progress any steps to enforce their security interests over collateral assets. (1)
2. The advertising requirements ensure that all relevant creditors are made aware of the restructuring process, irrespective of whether they are inside or outside of the relevant jurisdiction. In the case of SMB Tech, the creditors based in the United States, United Kingdom and Hong Kong with claims pursuant to SMB Tech's guarantees of subsidiary debts will be notified of the intended restructuring process. (1)
3. Creditors have the right to be heard at the hearing of the restructuring officer petition and they can still present a winding up petition with leave of the Court. Creditors will be provided with the opportunity to review, scrutinize and reject any deficient restructuring plan that is proposed by the company. In the case of SMB Tech, given that TCS has grown impatient with SMB Tech following SMB Tech's failure to satisfy the standstill agreement, TCS can still proceed with its intended winding up petition. (1)
4. There is a high threshold (75% of the value of claims) required to resolve any compromise or arrangement. Similar to the point above, SMB Tech's creditors with claims arising from SMB's guarantees of its subsidiaries' debts may determine to vote against any deficient restructuring process or the restructuring process in general (this is consistent with their current sentiments).
5. The appointment of restructuring officers does not add the stigma associated with 'liquidation' when compared to provisional liquidations, but it offers the same benefits such as the moratorium on creditor claims. This prevents the erosion of the company's value and, therefore, preserves any return available to creditors and

Commented [BB24]: Question 3.4- Sub-total = 6/6

contributories. (1)

6. The restructuring officers can monitor the daily activities of the directors and are able to refer matters to the Court for further directions in the event that the directors are found to not be acting in the best interests of the company and its creditors. The restructuring officer must also be an officer of the Court and be an independent qualified Cayman Islands insolvency practitioner so they are adequately equipped to perform these duties. In the case of SMB Tech, the contributories were seeking a petition for a provisional liquidator on the grounds of a perceived loss of trust and confidence in the management due to their delays and indecision. A restructuring officer could ensure that the management team of SMB Tech are progressing decisions in a timely manner in accordance with a restructuring plan. (1)
7. Given that the existing management retain control of operations and the restructuring process is generally shorter than a liquidation, the restructuring officers incur fewer costs as part of the process. The reduction in costs compared to a liquidation results in less erosion of the company's assets available to discharge its creditor and contributory claims. (1)

6 marks

Question 3.5

Commented [BB25]: Question 3.5 - Sub-total = 5/5

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

The relief that is available to the Court upon a restructuring petition includes:

- The Court can make an order appointing a restructuring officer. (1)
- The Court can adjourn the hearing conditionally or unconditionally. (1)
- The Court can dismiss the petition (e.g. in the case of *Aubit International*). (1)
- The Court can determine the powers and functions of the restructuring officer.
- The Court can impose conditions on the board of directors as it sees appropriate.
- The Court can make any other order as it sees fit. (1)

The relief that is not available to the Court upon a restructuring petition includes:

- The Court cannot place the company into official liquidation (1). This can only be made in accordance with Sections 92 and 95 of the Companies Act (2023 Revision) if a winding up petition has been presented in accordance with Sections 91G and 94 of the Companies Act (2023 Revision).
- The Court cannot ratify a restructuring plan that has inconsistencies with Cayman Islands law.
- A secured creditor can enforce its security interest without leave of the Court as it is not bound by the extra-territorial moratorium.

5 marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

In addition to the LPA, an ELP is governed by the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision) (1) ("ELP Act") which was drafted based on Delaware limited partnership legislation. The ELP Act expressly provides that the principles of common law and equity applicable to partnerships will apply to an ELP (1). It also provides that certain statutory powers or prohibitions are subject to the express provisions of the LPA.

The Companies Act (2023 Revision) and CWR apply to the liquidation and dissolution of ELPs. However, where there are inconsistencies, the ELP Act will take priority over the Companies Act (2023 Revision).

In addition to the above, the operation of ELPs may be guided by:

- Common law and equitable principles as long as they are consistent with the ELP Act.
- Relevant precedents established through case law, such as *Kuwait Ports Authority* FSD 236 of 2020.

Question 4.2

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

In accordance with Section 91(d) of the Companies Act (2023 Revision), the Court has jurisdiction to wind up a foreign company that: (i) has property located in the Cayman Islands; (ii) is carrying on a business in the Cayman Islands; (iii) is the general partner of an ordinary limited partnership or ELP; or is registered under Part IX of the Companies Act (2023 Revision).

Part XI of the Companies Act (2023 Revision) requires a foreign company to register in the Cayman Islands where it: (i) establishes a place of business; or (ii) commences carrying on a business within the Cayman Islands.

The Cayman Islands Court may also have jurisdiction to wind up a foreign company where:

- A holding company for a group is a Cayman Islands entity but the subsidiaries of

Commented [BB26]: Question 4.1 - Sub-total = 3/3

Commented [sp27]: Question 4.2 - Sub total = 5/5

the group conduct operations and hold assets in other jurisdictions. Under these circumstances, it may be necessary for any incoming liquidator to obtain recognition of their powers from foreign courts - the key jurisdictions for seeking this recognition are typically the United States, United Kingdom and Hong Kong.

- Liquidators have been appointed to a foreign entity (for instance, Chapter 11 Bankruptcy in the United States) but the foreign entity is also registered in the Cayman Islands. Under these circumstances, the foreign entity can also be wound up under Cayman Islands legislation in concurrent proceedings. In accordance with Order 21, Rule 2(2) of the CWR, the Cayman Islands liquidators can enter into international protocols with foreign officeholders to avoid duplication of work and ensure a streamlined process.

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)

No, in most cases, a judgement of a foreign court 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.

A judgement of a foreign court has no direct legal effect in the Cayman Islands and is not enforceable in the Cayman Islands in and of itself because the Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgements, nor is it a signatory or party to the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial Matters. However, the Cayman Islands Court will generally follow the principles of the common law of England in recognizing and enforcing foreign judgements which fall within the aforementioned rule.

Under common law, it is generally stated that foreign money judgements will be recognized and enforced as a debt against the judgement debtor where: (i) such judgement is final and conclusive in the foreign court; (ii) the judgement was obtained in a court of law which had jurisdiction over the judgement debtor; (iii) the judgement was not obtained by fraud; (iv) the judgement was not in respect of taxes, fines or penalties; (v) the enforcement of the judgement would not contravene the public policy of the Cayman Islands; and (vi) the rules of natural justice were observed in the foreign proceedings.

The above position is supported by a judgement *In the matter of Guoan International Limited* (unreported, 29 October 2021) which confirmed that a creditor may rely upon a foreign judgement as the basis for seeking a winding up order without first obtaining recognition or enforcement orders from the Cayman Islands Court.

Commented [sp28]: Question 4.3 - Sub total = 3/3

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)**

In accordance with The Bankruptcy Act (Cap 7) (1997 Revision) ("Bankruptcy Act") and The Grand Court (Bankruptcy) Rules (2021 Revision), the main statutory powers and duties are:

- Until the provisional order is made absolute, the Trustee must preserve the property such that it may be returned to the debtor in the event the provisional order is revoked. Once an absolute order is made, the Trustee must administer the debtor's estate for the benefit of creditors. **(½) Section 38 of the Act**
- The Trustee may carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business. **(1) Section 79**
- The Trustee may bring or defend any legal proceedings relating to the property of the debtor. **(1) Section 80**
- The Trustee must receive and adjudicate proofs of debt from creditors.
- Once an absolute order has been made, the Trustee must proceed to administer the debtor's estate for the benefit of the creditors. **(1) Section 65**
- Specifically, in accordance with Section 37 of the Bankruptcy Act, upon a provisional or absolute order being made, the property of the debtor immediately passes to, and vests, in the Trustee. Pursuant to Section 105 of the Bankruptcy Act, the Trustee may disclaim onerous and unprofitable property, such as land of any tenure burdened with covenants (e.g. a plot of land that has onerous / restrictive covenants which prevent the installation of water lines which would further prevent the construction or development of a farmhouse - this would lower the value of the property and, therefore, the attractiveness of such an investment as well as the number of prospective purchasers / interested parties).

You were not awarded full marks because one of your examples did not refer to the relevant section of the Bankruptcy Act.

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****

Commented [BB29]: Question 4.4 - Sub-total = 3/4