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

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

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**EXAMINERS**

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Ms Cassandra Ronaldson Mr Adam Crane Ms Gemma Lardner Ms Jennifer Fox  
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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.

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Commented [BB1]: TOTAL = 71.5/100 Well done!

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## INSTRUCTIONS

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

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

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

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)**

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

**Question 1.1**

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

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

**Question 1.2**

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

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

**Question 1.3**

Choose the **correct** statement:

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

- (a) 3

Commented [BB3]: Question 1 - Sub-total = 15/20

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

(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 [BB5]: 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.

Commented [BB6]: The correct answer is (d)

#### 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 [BB7]: 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 [BB8]: 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)

The content should include the following:

- (1) That person is a qualified insolvency practitioner and he or she meets the residency requirement contained in the Regulation 5; (1)
- (2) After making enquiries, that person believes that that person and that person's firm meet the independence requirement contained in Regulation 6; (1)
- (3) That person and/or that person's firm comply with the insurance requirement contained in Regulation 7; and (1)
- (4) That person is willing to act as Official Liquidator if appointed by the court. (1)

Where however, there is a petition that seeks an order for the appointment of a qualified insolvency practitioner jointly with another foreign practitioner, it shall be supported by an affidavit sworn by the foreign practitioner stipulating the following facts:

- (1) That person's professional qualifications;
- (2) The country in which that person is qualified to perform functions equivalent to those performed by official liquidators under the law or by trustees under that Bankruptcy Act (as amended and revised);
- (3) That person's professional experience;
- (4) That person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of the Regulation 7;
- (5) If that person has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company or a related party of the company, full particulars of such appointment should be given; and
- (6) Having made due enquiry, that person and that person's firm comply with the independence requirement contained in the Regulation 6.

**4 Marks, for the full marks in your first part of the answer if you'd had quoted the relevant CWR Order number and/or said it required a sworn affidavit that would have got you the extra mark.**

### 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)

Commented [BB9]: Question 2.1 - Sub-total = 4/5

Commented [BB10]: Question 2.2 - Sub-total = 2/5

This should be assessed in the light of ethical guidelines and the code of ethics applicable. The insolvency appointment following audit related work can give rise to a significant professional relationship. Here the firm Bodden & Ebanks Limited (the "firm") itself has completed audit related work. We assume that the proposed liquidators who are employees of the firm were not involved in the audit work. Nevertheless, a significant professional relationship will normally arise where the audit work was completed within the previous three years (1) and this took place in 2021. An insolvency Practitioner must not take the insolvency appointment as it is unlikely that appropriate action can be taken to reduce the threat to compliance with the fundamental principles to an acceptable level. However, this restriction does not apply where the insolvency appointment is in relation to a solvent/members' voluntary liquidation, in which case, the insolvency practitioner may normally take appointment as liquidator in this circumstance. However, in this case, it is not a members' voluntary liquidation and any liquidator appointed may need to review the audit work or audit working papers as part of the investigation during the course of the liquidation even so if the audit report was unqualified and yet the company became grossly insolvent. Therefore, the proposed liquidators should withdraw their consent to act (1) and state the full facts for doing so.

**2 Marks - this is more of a question related to IPR Regulation 6 v's Code of Ethics, the suggested answer is below which shows how marks would have been allocated.**

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

Commented [BB11]: 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)

**There are no qualification requirements to be appointed as voluntary liquidator. Any person, including a director or officer of the company, may be appointed as its voluntary liquidator. (Section 120 of the Cayman companies Act) (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)

**Within 28 days of the commencement of a voluntary winding up, the Liquidator(s) must:**

- (1) Lodge notice of the winding up with the Registrar;
- (2) Lodge the Liquidator(s) consent to act with the Registrar;
- (3) Lodge the directors' declaration of solvency with the Registrar (if supervision of the court is not sought);
- (4) In the case of a company carrying out a regulated business, serve notice of the winding up upon the Cayman Islands Monetary Authority; and
- (5) Publish notice of the winding up in the Gazette. (2)

**Question 2.3.3 (2/2 marks)**

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

**The company may resolve to remunerate on the basis of -**

- (1) A fixed sum;

- (2) An hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation;
- (3) A commission or percentage of the assets distributed or realised; and
- (4) A combination of these methods. (2)

**Question 2.4 (2/2 marks)**

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

Upon the hearing of the winding up petition, the court may:

- (1) Dismiss the petition;
- (2) Adjourn the hearing conditionally or unconditionally;
- (3) Make a provisional order; or
- (4) Any other order that it thinks fit.

**Question 2.5**

**Question 2.5.1 (2/4 marks)**

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

**Official Liquidators may be removed from office by order of the Court made on the application of a creditor or contributory of the company.**

**Circumstances for removal:**

- (1) If the Official Liquidator has a conflict of interest;
- (2) If the Official liquidator pursues litigation against the wishes of a creditor;
- (3) Impropriety or misconduct; and
- (4) Failing to investigate matters such as misfeasance by former directors.

**The application must be served on the Official Liquidators, each member of the liquidation committee, counsel for the liquidation committee (where applicable), and any other creditors or contributories as directed by the court. In addition, the Official Liquidators must be given at least 14 days notice of a Removal Summons.**

**Question 2.5.2 (2.5/5 marks)**

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

**If company is insolvent, then creditors interests in the estate comes first; If company solvent, contributories interest is paramount as creditors will either be fully paid or have already been paid prior to liquidation.**

**Commented [BB12]:** Question 2.4 - Sub-total = 2/2

**Commented [BB13]:** Question 2.5 - Sub-total = 4.5/9

**Commented [ni14]:** to get the additional two marks we needed an explicit reference to s. 107 of the Companies Act and CWR O.5, r.6.

**Commented [ni15]:** Everything you've said below is correct, but to score more highly the answer needed to be fuller, more cogent and make reference to the case of BTU Power Company.

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

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

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



### 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 during the course of the liquidation, the Official Liquidator changes the Official Liquidator's certification of the company's solvency or insolvency, the Official Liquidator should take the following steps to reconstitute the liquidation committee:**

**If the company is certified to be solvent, any creditor members of its liquidation committee shall automatically cease to be members and the Official Liquidator shall convene a meeting of contributories for the purposes of electing new members from amongst the company's contributories. (Order 9, Rule 3 of the Companies Winding Up Rules (2023) Consolidation) (As Amended)**

**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)).**

### Question 2.7

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

**The liquidator shall file the order for dissolution with the Registrar within 14 days from the date upon which it was perfected.**

**Following the dissolution of the company, the liquidator must retain the liquidation files in safe custody for at least three years.**

**Upon making of an order dissolving the company, the liquidator's duties as officeholder cease except for any residual duties preserved by the order for dissolution, including the preservation, storage and destruction of the company's books and records, and dealing with the unclaimed dividends.**

### Question 2.8

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

**The Liquidator has the power as agent of the company, to;**

- (1) collect, take possession, retain, manage and realise the company's assets and to distribute the assets of the company to its creditors and where there is a surplus, to the person entitled to it;**
- (2) to report to the company's creditors and contributories upon the affairs of the company and the manner in which it the company has been wound up;**

Commented [ca16]: Question 2.6 Subtotal 3.5/4

Commented [ca17]: Question 2.7 Subtotal 5/5

Commented [BB18]: Question 2.8 - Sub-total = 0/5

**(3) The liquidator may with the sanction of the court, may exercise any of the powers specified in Part 1 of Schedule 3 and with or without sanction, exercise any of the general powers specified in Part II of Schedule 3.**

Please see model answer below:

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)**

**Relevant date means in a case where a provisional liquidator is appointed, the date of that person's appointment and in any other case, the commencement of the winding up.. (1)** The Winding Up of the company is deemed to have commenced at the time of passing of the relevant resolution ( $\frac{1}{2}$ ) or the expiry of the relevant period ( $\frac{1}{2}$ ) or the occurrence of the relevant event of the date of the presentation of the petition to appoint a restructuring officer ( $\frac{1}{2}$ ) pursuant to Section 91B. In any other circumstance, not specified in Section 100(1), the winding up if the company by the court is deemed to commence at the time of the presentation of the petition for winding up. **(1)**

Please see model answer below:

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

**Commented [BB19]:** Question 2.9 -Sub-total = 3.5/5

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

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

**QUESTION 3 FOLLOWS ON NEXT PAGE / . . .**

### QUESTION 3 - CORPORATE RESCUE (20 MARKS)

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

#### FACT PATTERN

##### SMB TECH CORPORATION

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

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

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

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

#### Question 3.1

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

**Commented [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 relevant legislation for guidance in this instance will be the Insolvency Practitioners' Regulations (2023 Consolidation) (As Amended) under Part II Regulation 7. (1)**

The regulation 7 states that a qualified insolvency practitioner shall not be appointed by the Court as official Liquidator of any company unless that person and the firm of which that person is a partner or employee or the company of which that person is a director or an employee, has professional indemnity insurance (up to a limit of at least US\$10 million in respect of each and every claim (1) 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.

Regulation 7 further goes on to state that an insolvency practitioner who has professional indemnity insurance complying with the policy limit specified in Practice Direction No 1/2003 shall continue to be treated as being compliant with this regulation until 31 march 2009, notwithstanding that the aggregate limit under such policy is less than US\$ 20 million.

**In this case, the chosen provisional liquidator is unlikely to be appointed by the court. (1)**

3 marks - the main thing missing from this answer is picking up on the foreign practitioner point re the chosen provisional liquidator. Should have highlighted that point, and then linked Regulation 7 of the IPRs applying to foreign practitioners by virtue of Regulation 8 of the IPRs. I've set out the model answer below, to give you a flavour of the type of answer that was being sought.

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 158 (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)

The company must demonstrate:-

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

**2 Marks**

**Question 3.3**

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

Upon presentation of the Restructuring Petition, it is required to be advertised in accordance with Form Number 3A of the CWR:-

- (1) Once in a newspaper having circulation in the Cayman Islands; and (½)
- (2) In a newspaper circulating in a country (or countries) in which the petition is most likely to come to the attention of the company's creditors and contributories. (½)

Advertisements must appear no more than seven business days after the filing of a Restructuring Petition (½) and not less than seven business days before 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)

The Companies (Amendment) Act and the Amendment Rules ensure that there are adequate safeguards/protections in place to preserve and protect the rights of creditors. Some are as follows:-

- (1) A creditor may apply to the court for a variation or a discharge of an order appointing the restructuring officers through way of Summons in Form Number 16B of the CWR. The company, restructuring officer or the CIMA may also bring such an application under Section 91E of the Companies Act; (1)

**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 = 3/6

- (2) A creditor may make an application to the court for the removal and replacement of a restructuring officer through way of summons in Form Number 16C of the CWR; (1)
- (3) Creditors with security over the whole or part of the assets of the company will remain entitled to enforce that security without leave of the court and without reference to the restructuring officer. (3)
- (4) Creditors may nevertheless present a winding up petition in respect of the company following presentation of a Restructuring Petition, with leave of the Court.

3 marks - and then any of the below would have given you marks.

- The default position is that a Restructuring Petition will be heard on notice to stakeholders (while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made *ex parte* by default). (1 mark)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint JPLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (1 mark)
- 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)

Relief that is or is not available -

**0 marks, incomplete answer. The question is essentially asking candidates to list what a Court can or cannot do at the RO hearing. Below is the model answer.**

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

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

**Commented [BB24]:** Question 3.5 - Sub-total = 0/5

QUESTION 4 FOLLOWS ON NEXT PAGE / ...



#### QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

##### Question 4.1

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

The principal statutes governing the formation and operation of the Cayman Island's ELPs are the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2012 Revision) (1) (the ELP Act). Unlike most Cayman Island statutes, the ELP Act has no English equivalent, and was originally drafted based on the Delaware limited partnership legislation. The ELP Act expressly provides that the principle of common law and equity applicable to partnerships will apply to an ELP. (1)

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

##### Question 4.2

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

Under Section 91(d) of the Companies Act, the Cayman Islands Court has jurisdiction to wind up a foreign company that:

- (1) owns property located in the Cayman islands;
- (2) it is carrying on business in the Cayman Islands;
- (3) It is the general partner of an ordinary limited partnership or an ELP; or
- (4) It is registered under Part IX of the companies Act.

Part IX of the companies Act requires a foreign company to register in the Cayman Islands where it establishes a place of business, or commences carrying on business within the Cayman Islands.

Commented [sp26]: Question 4.2 - Sub total = 5/5

##### Question 4.3

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

Generally, a judgment or order of a foreign court has no direct legal effect in the Cayman islands. A foreign judgment is not enforceable in the Cayman Islands in and of itself. There are steps that have to be initiated in order to have a foreign judgment legally enforced in the Cayman islands. In addition, foreign judgments from other jurisdictions which are not registrable under the Foreign Judgments Reciprocal Enforcement Act (1996 revision) must be enforced by way of commencing a new action in the Cayman Islands.

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

Generally, the Cayman islands Court will use the following principles of the common law of England in recognising and enforcing foreign judgments which fall within the following rules:-

- (e) The judgment is final and conclusive in the foreign court;
- (f) The judgment was obtained in a court of law which had jurisdiction over the judgment debtor;
- (g) The judgment was not obtained by fraud;
- (h) The judgment was not in respect of taxes, fines or penalties;
- (i) The enforcement of the judgment would not contravene the public policy of the Cayman Islands; and
- (j) The rules of natural justice were observed in the foreign proceedings.

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

#### Question 4.4

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

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

-Until the provisional order is made absolute, it is the duty of the Trustee is to preserve the property such that it may be returned to the debtor in the event the provisional order is revoked. (1)

-The Trustee may carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the business (Section 79 of the Bankruptcy Act). (1)

-The Trustee may bring or defend any legal proceedings relating to the property of the debtor. (1)

-The Trustee administers the debtor's estate for the benefit of the creditors.

- The Trustee must receive and adjudicate the Proofs of Debt filed by creditors. (1)

TOTAL MARKS: [100]

**\*\* END OF ASSESSMENT \*\***