



INSOL
INTERNATIONAL



**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)**

EXAMINERS

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

MODERATORS

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

It is imperative that all candidates read and take cognisance of the examination
instructions on the next page.

All candidates are expected to comply with ALL the instructions.

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

Choose the **correct** statement:

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

- (a) 3

Commented [DDB1]: Total: 82/100

Very well done! (and apologies for the delay in returning your paper)

Commented [BB2]: Question 1.1 - Sub-total = 19/20

(b) 5

(c) 6

(d) None of the above

Question 1.4

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

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

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

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

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

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

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

- (d) Within 7 days of the appointment.

Question 1.7

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

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

Question 1.8

Choose the **correct** statement:

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

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

Question 1.9

Choose the **correct** statement:

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

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

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

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

Question 1.11

Select the **incorrect** statement:

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

Question 1.12

Choose the **correct** statement:

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

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

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

Question 1.13

Select the **correct** statement:

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

Question 1.14

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

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

Question 1.15

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

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

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

Question 1.16

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

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

Question 1.17

Select the **correct** statement:

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

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

Question 1.18

Choose the **correct** statement:

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

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

Blusea Digital Capital Limited (Blusea) was established in 2018 in the Cayman Islands as a digital asset management platform. Blusea 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 Blusea's own name. Blusea's clientele comprised a diverse mix of institutional investors, high-net-worth individuals, and consumers.

On 24 June 2022, one of Blusea'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 Blusea in May 2023. The petition faced vehement opposition from Blusea, which asserted that deposits had been transferred to its joint venture partner. Blusea 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, Blusea'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 Blusea's financial statements, with Blusea'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. Blusea'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)

A nominated official liquidator's consent to act should be in the form of a sworn affidavit compliant with Companies Winding Rules ("CWR") O.3, r.4 stating that: (1)

1. the person is a qualified insolvent practitioner and meets the residency requirement in Regulation 5 of the Insolvency Practitioners' Regulations (2023 Consolidation); (1)
2. having made due enquiry, that person believes that that person and that person's firm meet the independence requirement contained in Regulation 6; (1)
3. that the person are in compliance with the insurance requirements in Regulation 7; and (1)
4. that person is willing to act as official liquidator is 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 will not be able to act in relation to Bluesea. (1)

As employees of the professional accountancy firm, Bodden & Ebanks, the proposed liquidators will be members of the Cayman Islands Institute of Professional Accountants ("CIIPA") which requires its members to abide by the IESBA Code of Ethics ("ICoE").

The ICoE is based on five fundamental principles, namely: (1) integrity; (2) objectivity; (3) professional competence; (4) confidentiality; and (4) professional behaviour.

In carrying out their professional activities, accountants including insolvency practitioners, must apply the conceptual framework by identifying, evaluating, and assessing threats to their compliance with the fundamental principles. Such 'threats' may be categorised as the: (1) self-review threat; (2) advocacy threat; (3) familiarity threat; (4) intimidation threat; and (5) intimidation threat.

Based on Bodden & Ebanks previous professional relationship with Bluesea, having acted

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

Commented [DDB5]: Question 2.2 - subtotal 3/5

as the company's auditors in 2021, the proposed liquidators consider the 'familiarity threat' to their ability to act objectively, particularly in circumstances where there are reports of a fraudulent investor scheme during the period in which Bodden & Ebanks would have been auditing Bluesea's financials.

In any event, given that the audit engagement came to an end less than 3 years (1) before the commencement of the winding up order, the proposed liquidators are precluded from acting by virtue of regulation 6(2) of the Insolvency Practitioners' Regulations which provides: (1)

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

In the circumstances, the proposed liquidators should take steps to address the threat by ending their insolvency appointment.

3 marks see model answer

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

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

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

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

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

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

Question 2.3

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

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

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 for Tom and Jerry to act as voluntary liquidators. Section 120 of the Companies Act (2023 Revision) provides that: *"any person, including a director or officer of the company, may be appointed as voluntary liquidator."* (1)

Question 2.3.2 (2/2 marks)

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

Pursuant to s. 123(1) of the Companies Act, Tom and Jerry must:

1. file a notice of the winding up with the Registrar; (½)
2. file the liquidator's consent to act with the Registrar; (½)
3. file the director's declaration of solvency with the Registrar (if the Court's supervision is not being sought); (½)
4. in the case of a regulated business, serve notice of the winding up upon the Authority; and (½)
5. publish a notify of the Winding up in the Gazette.

If Tom and Jerry fail to carry out the aforementioned steps, they commit will an offence and be liable to pay a fine of CI\$10,000 (s. 123(2) of the Companies Act.)

Question 2.3.3 (2/2 marks)

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

By virtue of CWR O.13, r.9(2), the company may resolve to remunerate Tom and Jerry on the basis of:

1. an hourly rate for time reasonably and properly devoted to the liquidation; (½)
2. a fixed sum; (½)
3. a commission or percentage of the assets distributed or realised; or (½)
4. a combination of these methods. (½)

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 hearing a winding up petition of a contributory (or a creditor), pursuant to section 95(1) of the Companies Act, the Court may: (a) dismiss the petition; (b) adjourn the petition conditionally or unconditionally; (c) **make a provisional order**; or (d) an other order that it thinks fit, but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets [Emphasis added].

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)

Section 107 of the Companies Act provides that: "An official liquidator may be removed from office by order of the Court on the application of a creditor or contributory of the company."

Section 107 confers a broad discretion; however, an applicant must have a sufficient interest in the outcome of the liquidation to have standing to apply. In the case of an insolvent liquidation, only a creditor may apply, and in the case of a solvent liquidation, only a contributory may apply.

A successful applicant must also demonstrate that there is a 'good reason' for seeking the liquidator's removal (See *BTU Power Company 2019 (1) CLR Note 7* citing *AMP Enterprises Ltd (t/a Total Home Entertainment) v Hoffman [2002] BCC 996*).

The Court may find 'good reason' to exercise its discretion if it is satisfied there has been impropriety or misconduct on the part of the official liquidator, or if a conflict of interest has arisen. In the absence of impropriety or misconduct, the Court may grant the application if the official liquidator's removal was for the general advantage of the majority. Parker, J. summarised the position in *BTU Power Company*:

"Care needed to be exercised when removing generally effective and honest

Commented [ni7]: great answer

liquidators. It should not be seen as easy to remove a liquidator so as to encourage applications by creditors who had not had their preferred liquidators appointed or who were for some other reason disgruntled. It was sufficient to satisfy the court that the removal of the liquidator would be for the general advantage of the majority of the persons interest in the liquidation; in the absence of impropriety, the court would have regard to the wishes of the majority of those interest but, where impropriety was shown the court might override their interests (*Johnson v. Deloitte & Touche A.G.*, 1999 CILR 297, followed)."

The removal application shall be in the form of a summons (CWR O.6 , r, 6.(1)) supported by an affidavit containing all the facts and matter relied upon (CWR O.6 , r, 6.(2)).

Pursuant to CWR O.5, r.6(2), the removal application must be served upon:

1. the official liquidator; and
2. each member of the liquidation committee; or
3. counsel for the liquidation committee; and
4. such other creditors or contributories as the Court may direct.

The official liquidator is entitled to at least 14 days from the date service of the removal summons.

Question 2.5.2 (4.5/5 marks)

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

To have sufficient standing to apply to remove an official liquidator from office, in the case of an insolvent liquidation, only a creditor may apply, and in the case of a solvent liquidation, only a contributory may apply.

The class of potential applicants varies depending on the solvency of the company because a successful applicant must have the ultimate interest in the outcome of the liquidation and the distribution of assets (see *Johnson v Deloitte & Touche A.G.*, 1999 CILR 297). In an insolvent liquidation, the creditors' interests would rank in priority to the contributories. In a solvent liquidation, there would be no creditors.

By way of illustration, in *BTU Power Company*, Parker, J. refused an application to remove an official liquidator issued by a former director of the company on the basis that the applicant did not have a legitimate interest in the outcome of a solvent liquidation and therefore had no standing to apply.

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

Commented [ni8]: Good answer. To get the final 0.5 marks I would have wanted you to hit the nail on the head by explaining that, in an insolvent liquidation, shareholders will get nothing, and that's why they have no legitimate interest in the identity of the OL.

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)

Commented [ca9]: Question 2.6 subtotal = 3.5/4

Upon changing the determination of the company's solvency pursuant to CWR O.8, r. 1(2), and filing the Court Form No. 14 immediately thereafter, for as long as the official liquidator determines that the company is solvent, he shall convene meetings of contributories only (as opposed to creditors) (CWR O. 8, r.1(5)).

By changing the determination of the company's solvency, any creditor members of the liquidation committee shall 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 (CWR O. 9, r. 3(2)).

Question 2.7

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

Commented [ca10]: Question 2.7 Subtotal =4/5

A liquidator has a duty to create and maintain a complete record of work done and steps taken in connection with the liquidation (O. 26, r. 2(1)) including, a copy of the Court file, minutes of meetings of the creditors, contributories or liquidation committee, reports, accounts, proofs of debts and their adjudication, bank accounts, correspondence and notices sent or published by the liquidator (CWR O. 26, r. 2 (2)).

Upon the making of an order for dissolution, the Court will ordinarily give directions in respect of the preservation, storage, and destruction of the company's books (CWR O. 26, r. 3(4)).

A liquidator must retain the liquidation files for at least 3 years following the dissolution of the company (CWR O.26, r. 2(3)).

The costs post-dilution storage shall be an expense in the liquidation and will appear in the liquidator's final accounts (CWR O. 26 r. 3(6)).

Question 2.8

Commented [BB11]: Question 2.8 - Sub-total = 4/5

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

If the company has failed, a liquidator has the power to investigate the cause of its failure. (1) A liquidator also has the power to investigate the promotion, business, dealing and affairs of the company. In the liquidator's discretion, he may report the outcome of the investigations to the Court (section 102(1) of the Companies Act). (1)

Pursuant to section 102(2)-(3) of the Companies Act, a liquidator shall have, with leave of the Court, the power to: (1) assist the Cayman Islands Monetary Authority or the Royal

Cayman Islands Police Service investigate the conduct of certain persons, including, current of former directors or officers of the company, current of former professional service providers (with the exception of, or managers or promoters company; and (2) institute and conduct a criminal prosecution. (2)

With prior approval of creditors or contributories, depending on whether the company is solvent or insolvent, the costs of the investigation and prosecution may be directed by the court to be paid out of the assets of the company (section 102(3) of the Companies Act).

You would have been awarded a further mark for mentioning the following: 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".

Question 2.9

Commented [BB12]: Question 2.9 - Sub-total = 4/5

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)

Either a provisional liquidator or an official liquidator may require individuals employed by the company, during the period of one year immediately preceding the "relevant date", to prepare and produce a statement of affairs of the company (section 101(1) and 101(3)(c) of the Companies Act).

In the context of a provisional liquidation, the "relevant date" means date upon which the provisional liquidator was appointed (section 101(6)(a) of the Companies Act).

In any other case, the "relevant date" means the commencement of the winding up (section 101(6)(b) of the Companies Act). This date may vary depending on the method of commencement. (1)

Ordinarily, the winding up of a company will be deemed to commence when a winding up petition is presented to the Court. However, the commencement date may be earlier (1) if prior to the presentation of a winding up petition: (a) a resolution has been passed by the company for voluntary winding up; (b) the period fixed for the duration of the company by the articles of association has expired; (c) an event has occurred which the articles provide the company is to be wound up; or (d) a restructuring officer has been appointed (section 100(1) of the Companies Act). (2)

**** 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 [DDB13]: Q 3.1 - subtotal 2 / 5

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

Pursuant to Regulation 7 (1) of the Insolvency Regulations (2023 Consolidation), a qualified insolvency practitioner, shall not be appointed by the Court as an official liquidator unless he or any firm of which he is a partner or 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 aggregate, with a deductible of not more than US\$1 million, applicable to the negligent performance or non-performance of his duties. The mandatory language of Regulation 7 means that the liquidator could not be appointed by the Court. (1)

2 marks, see model answer below

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

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

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

"A foreign practitioner who meets the independence and insurance requirements of Regulations 8 and 7 of the IPRs may be appointed by the Court as an official liquidator of a company jointly with a qualified insolvency practitioner (but not as sole official liquidator). A foreign practitioner need not meet the residency requirement of Regulation 5." (1 mark)

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

"A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless he and the firm of which he is a partner or employee or the company of which he is an employee, has professional indemnity insurance (up to a limit of at least US\$10 million in respect of each and every claim and at least US\$20 million in the aggregate, with a deductible of not more than US\$100,000) applicable to the negligent performance or non-performance of his duties as an official liquidator generally." (emphasis added). (1 mark)

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

Question 3.2

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

Pursuant to section 91B of the Companies Act, the company must demonstrate to the Court

Commented [DDB14]: Q 3.2 - subtotal 2/2

upon the presentation of a petition for the appointment of a restructuring officer that the company:

1. is or unlikely to become able to pay its debts (within the meaning of section 93 of the Companies Act); and (1)
2. intends to present a compromise or arrangement to its creditors, or classes of creditors, by way of a consensual restructuring. (1)

2 marks

Question 3.3

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

Pursuant to CWR O.1A, r. 1(3), unless the Court otherwise directs, a petition for the appointment of a restructuring officer must be advertised once in the newspaper having circulation in the Cayman Islands. (½)

Similarly, in the case of a company carrying on business outside of the Cayman Islands, unless the Court otherwise directions, a petition for the appointment of a restructuring office must be advertised once in a newspaper having circulation in a country in which is it most likely to come to the attention of the creditors (CWR O.1A, r. 1(4)). (½)

In addition, your answer must provide the time frame for advertising, ie no more than seven business days after the filing of a Restructuring Petition (1/2 mark) and not less than seven business days before the hearing date (1/2 mark).

Question 3.4

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

There are a number of protections in place in the new restructuring officer regime which safeguard the interests of the creditors including:

1. a creditor has standing to appear at the hearing of the restructuring petition upon giving 3 days' notice of whether it intends to suppose or oppose the appointment of the restructuring officer (CWR O.1A, r.3 (in CWR Form No. 4A)). (1)
2. a creditor of the company, including contingent or prospective creditors may apply to vary or discharge the appointment of the resuturing officer (section 91E(c) of the Companies Act). (1)
3. a restructuring officer may be removed from office and replaced by an alternative restructuring officer of the Court on an application of a creditor of the company,

Commented [BB15]: Question 3.3 - Sub-total = 1/2

Commented [DDB16]: Q 3.4 - subtotal 5/6

including a contingent of prospective creditor (section 91F(1)(c) of the Companies Act). (1)

4. a creditor who has security over the whole or part of the assets of the company is entitled to enforce its security without leave of the Court and without reference to the restructuring officer (section 91H(c) of the Companies Act). (1)
5. with leave of the court, a creditor may present a concurrent winding up petition following a Restructuring petition, which may be heard at the same time (CWR O.1A, r.5).
6. If the restructuring regime is unsuccessful and a creditor has presented a concurrent winding up petition which results in the company being wound up, the winding up order will be deemed to have commenced on the date the restructuring petition was presented. This has the advantage of extending the time in which clawbacks may be made of voidable preference (section 145 of the Companies Act). Further, if there has been any disposition of the company's property / transfer of shares in the period between presentation of the restructuring petition and the winding up order, the transaction will be void (section 99 of the Companies Act). (1)

5 marks

Question 3.5

Commented [DDB17]: Q 3.5 - subtotal 5/5

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

Pursuant to section 91B.(3) of the Companies Act, upon hearing a petition for the appointment of a restructuring officer, the Court may: (a) make an order appointing a restructuring officer; (1) (b) adjourn the hearing conditionally or unconditionally; (1) (c) dismiss the petition; (1) or (d) make any other order as the Court thinks fit (1), except an order placing the company into official liquidation (1), which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

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)

An ELP is also governed by the Exempted Limited Partnership Act (2021 Revision) ("ELP Act") (1) and relevant provisions of the Partnership Act (2014 Revision) (1). By virtue of section 3 of the ELP Act, the rules of equity and common law also apply to an ELP. (1)

Commented [BB18]: 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)

Pursuant to section 91(d) of the Companies Act (2023 Revision), the Cayman Islands Court has jurisdiction make a winding up order in respect of a foreign company which: "(i) has property located in the Islands; (ii) is carrying on business in the Islands; (iii) is the general partner of a limited partnership; or (iv) is registered [as a foreign company] under Part IX."

Commented [sp19]: Question 4.2 - Sub-total = 4/5

Question 4.3

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

[Type your answer here]

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

Commented [sp20]: Question 4.3 - Sub-total = 0/3

Question 4.4

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

From the moment that a provisional or absolute order is made, the debtor's property vests in the trustee in bankruptcy.

Upon a provisional order being made, the trustee has a duty to preserve all such property in such a state as to permit it being returned to the debtor in the condition in which it was

Commented [BB21]: Question 4.4 - Sub-total = 4/4

seized, in the event of the revocation of the provisional order (section 38 of the Bankruptcy Act (1997 Revision)). (1)

The trustee has other powers such as: (1) the power to bring or defend any actions or legal proceedings relating to the property of the debtor (section 80 of the Bankruptcy Act); (1) and (2) the power to carry on the trade of the debtor in so far as may be necessary or expedient for the beneficial winding up or sale of the same (section 79 of the Bankruptcy Act); and (1)

Upon an absolute order being made, the trustee shall administer the debtor's estate for the benefit of creditors (section 65 of the Bankruptcy Act (1997)). (1)

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****