



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.

Commented [BB1]: TOTAL = 72.5/100 - Well done!

Commented [BB2R1]: Mark adjusted to 73/100

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 = 17/20

(b) 5

(c) 6

(d) None of the above

Question 1.4

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

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

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

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

Question 1.6

Choose the **correct** statement:

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

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

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

- (d) Within 7 days of the appointment.

Question 1.7

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

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

Question 1.8

Choose the **correct** statement:

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

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

Question 1.9

Choose the **correct** statement:

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

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

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

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

Commented [BB4]: 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 [BB5]: 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.

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 [BB6]: 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 of the Affidavit providing the IP's Consent to Act must include assertions relating to the following main areas: Qualification, Residency, Independence, Insurance and Appointments. (1)

The requirement for each area varies depending on whether the IP resides in the jurisdiction or is a foreign IP.

If the IPs who were appointed to act as Official Liquidators of Bluesea resides in the jurisdiction, the Consent to act must include the following information:

- (a) Qualification: A statement that he is a qualified IP in accordance with the Insolvency Practitioners' Regulations. (1)
- (b) Residency: A statement that he is in compliance with the residency requirements set out in Regulation 5 of the IPRs. (1)
- (c) Independence: Confirmation that after making reasonable efforts to enquire, he is in compliance with the independence requirement in Regulation 6 of the IPRs. (1)
- (d) Insurance: Confirmation that he is in compliance with the insurance requirement set out in Regulation 7 of the IPRs. (1)
- (e) Appointment: Confirmation that he is willing to act as an official liquidator (1)

If one of the appointed Liquidators is a foreign IP, the consent to act must include the following information:

- (a) Qualification: The IP must list his professional qualifications and experience.
- (b) Residency: Details of the relevant country in which he performs as a qualified IP as set out in Regulation 6 of the IPRs
- (f) Independence: Confirmation that after making reasonable efforts to enquire, he is in compliance with the independence requirement set out in Regulation 6 of the IPRs.
- (c) Insurance: Confirmation that he has the appropriate professional indemnity insurance as set out in the IPRs
- (d) Appointment: The IP must include the full particulars of any foreign appointments to act in the capacity of liquidator, trustee, receiver or administrator of the Company or related party.

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

Commented [BB7]: Question 2.1 - Sub-total = 5/5

Commented [BB8]: Question 2.2 - Sub-total = 2/5

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)

Pursuant to Regulation 6(2) of the IPRs (1), A qualified IP, or the firm of which the IP is an employee, can only be regarded as independent if he or the firm, has not acted in relation to the company as auditor within the last 3 years preceding the commencement date of the Liquidation. (1) Given that Bodden & Ebanks Limited ("B&E") previously acted as auditors of Bluesea in 2021, a threat to compliance has been created and the proposed liquidators should consider the ICoE conceptual framework to identify, evaluate and address threats so that a proper safeguard can be applied.

The lack of independence can be identified as a Self-review threat or a familiarity threat because there is a possibility that the IP will not use professional judgement due to previous services provided to Bluesea and previous relationships that may have been formed while B&E acted as auditors. These circumstances also invalidate the IPs eligibility and assertion that he believes that him and the firm meet the independence requirement set out in Regulation 6 of the IPRs. As such, it will be difficult to reduce the threat to an acceptable level. This can lead to further ethical issues and ruin the reputation of the firm. Given the above facts, B&E should consider notifying Whitesand, the petitioning creditor, so that they may file an application to withdraw the Winding up Petition.

2 marks

Model answer shown below as a guide.

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

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

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (1/1 mark)

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

In accordance with section 120 of the Companies Act (2023 Revision), any person may be appointed as a voluntary liquidator of a Cayman Islands company. As such, there are no specific qualifications or requirements that Tom and Jerry should meet in order to be appointed as voluntary liquidators. (1)

Question 2.3.2 (2/2 marks)

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

In accordance with section 123 of the Companies Act (2023 Revision), within 28 days of the commencement of a voluntary liquidation, Tom and Jerry must file to following notices and documentation with the Registrar:

1. Notice of Winding Up
2. Liquidators Consent to Act
3. Directors' Declaration of Solvency

In addition to the above, Tom and Jerry will also need to:

4. Serve the Notice of Winding up to the Cayman Islands Monetary Authority, if Cheese Limited is carrying on a regulated business.
5. Publish the Notice of Winding up in the Cayman Islands Gazette. (2)

If Tom and Jerry fail to comply with the above requirements set out in the Companies Act, they will be deemed as committing an offence and will be liable to a fine of KYD \$10,000.

Question 2.3.3

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

As set out in O.13,r.9 of the Court Winding up Rules, the basis of Tom and Jerry's remuneration as voluntary liquidators must be approved by resolution of the company.

The company may resolve to remunerate the voluntary liquidators on the basis of:

- (a) An hourly rate for the time worked on the liquidation
- (b) A fixed amount
- (c) A commission or percentage of assets distributed or realised; or
- (d) A combination of the methods described above. **(2)**

It must be noted that Tom and Jerry will not be entitled to any remuneration prior to the authorisation by a resolution passed at a general meeting of the company.

The above requirement is not applicable in the event that the final general meeting was convened but no member attends and votes or any remuneration is to be paid with the Court's approval.

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)**

In accordance with section 95 of the Companies Act (2023 Revision), Upon hearing the winding up petition, the court may:

- (a) Dismiss the petition.
- (b) Adjourn the hearing conditionally or unconditionally.
- (c) Make a provisional order.
- (d) Any order that it sees fit.

Section 95(3) of the Companies Act, further explains that if the winding up is sought by contributories on just and equitable grounds, the court has powers to make the following alternative orders:

- (a) An order regulating conduct of future company affairs.
- (b) An order which required the company to refrain from an act of which a petitioner has complained about.
- (c) An order which authorizes civil proceedings to be brought on behalf of the

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company by the petitioner based on what the Court may direct; or:
(d) An order which provides for the purchase of shares of any members of the company by other members or the company itself.

Question 2.5

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Question 2.5.1 (2.5/4 marks)

Commented [ni12]: good answer, 1 missing answer on service (0.5 marks) and no reference to CWR O.5, r.6 (1 mark)

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

In accordance with section 107 of the Companies Act, "An official liquidator may be removed from office by order of the Court made application of a creditor or a contributory of the company".

Creditors and contributories who hold ultimate interest in the distribution of the company's assets, are the only parties who may apply to remove an official liquidator.

To remove an official liquidator, the creditor or contributory must apply to the court of the relevant orders by way of a Removal Summons. The Removal Summons must be accompanied by an affidavit which sets out all of the relevant facts that will be relied upon to support the application for removal. A qualified IP must also be nominated in the Removal Summons.

Commented [ni13]: you missed counsel to the LC - if appointed.

- (a) The Removal Summons must then be served upon the following parties:
- (b) The official liquidator
- (c) Each member of the liquidation committee
- (d) Any other creditors or contributories as directed by the court.

Commented [ni14]: You're getting close to explaining teh concepts, but not clearly enough to get full marks and you also needed to reference BTU Power Company (para 4.2.6.2 of the course notes) to get the 5th mark.

The Official liquidator must be given 14 days' notice of a Removal Summons.

Question 2.5.2 (2/5 marks)

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

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

The class of the potential applicant varies with the solvency of the company because when a company is insolvent, a contributory no longer has any economic interest in the company. As such, parties who bring a winding up petition on the grounds that the company is unable to pay its debts are usually classified as creditors.

- 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).

This can also be further explained when examining the priority of parties in a liquidation. Usually, shareholders rank below all other creditors. Therefore, in the event that the company is placed into liquidation, all classes of creditors will be compensated before the return of capital to shareholders.

Commented [ni15]: the question requires you to answer and explain why this is the case

Commented [ni16]: not quite. You've expressed this the wrong way around.

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)

The eligibility of the members of the Liquidation Committee is dependent on the solvency determination of the Official Liquidators. In this case, where it has been determined that the company is now solvent, the official liquidator may only convene meetings of its creditors only in accordance with O.8, r.1 of the CWR. As such, the liquidation committee will now need to consist of contributories only. This also changes the voting rights of the liquidation committee.

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)

Following the making of an order for dissolution, the liquidator must deal with matters relating to unclaimed dividends and undistributed assets in accordance with section 154 of the Companies Act. This includes, establishing a trust account for the receipt of unclaimed dividends, transfer of titles to the liquidator of undistributed assets and payments out of the trust accounts to relevant parties.

In addition, upon making an order of dissolution, the Court must give directions as it relates to the preservation, storage and destruction if the company's remaining books and records according to Order 26, rule 3(4) of the CWR.

For full marks references should be made to:

- Filing the order for dissolution with the Registrar within 14 days (see order 22, rule 2(3));
- Upon the making of an order dissolving a company, the official liquidator's duties as officeholder cease save for any residual duties preserved by the order for dissolution, including for the preservation, storage and destruction of the company's remaining books and records, and dealings with unclaimed dividends. An order for discharge of the liquidators is often included in the order for dissolution.
- Following the dissolution of a company, the liquidator shall retain the liquidation files in safe custody for at least 3 years pursuant to O.26, r.2(3) of the CWR.

Commented [ca17]: Question 2.6 Subtotal 3.5/4

Commented [ca18]: This should be contributories

Commented [ca19]: Question 2.7 Subtotal =3/5

Question 2.8

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

As set out in section 102 of the Companies Act, where a winding up order is made by the Court, the liquidator has the power to investigate:

- (a) If the company has failed, the causes of failure
- (b) Generally, the promotion, business, dealings and affairs of the Company, and to make such report, if any, to the Court as the person thinks fit. (1)

Section 102 further explains that subject to directions of the Court, the liquidators also have power to assist the Authority and the RCIPS to investigate the conduct of persons, and institute and conduct a criminal prosecution of relevant persons. (1)

The costs of investigation can be paid out of the assets of the company if approved by the creditors or contributories.

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)

The relevant date is seen in section 101(3)(c) of the Companies Act, where it describes the following individual:

"Persons who have been employees of the company, during the period of one year

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immediately preceding the relevant date.

In the case of a provisional liquidation, the relevant date mentioned above refers to the date that a provisional liquidator was appointed. In any other case, the commencement of winding up. **(1)**

Persons who fall into the above category may be required by the Court to prepare or submit a statement of affairs.

Please refer to the model answer below as you have not addressed the question relating to the "relevant date":

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 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

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

Firstly, we will need to determine if the foreign practitioner meets the requirements set out in Regulation 8 of the IPRs. According to Regulation 8, a foreigner may be appointed by the Court if he meets the independence and insurance requirements of Regulation 6 and 7. (1)

Regulation 7 states that a qualified practitioner may not be appointed by court unless he or the associated firm has professional indemnity insurance of up to a limit of at least \$10m in respect to each claim and at least \$20m in the aggregate. (1)

In the case of the chosen provisional liquidator, his professional indemnity insurance is only \$5m which is below the \$10m requirement (1). The case also states that he refuses to increase his professional indemnity liability. This will also create further issues with the winding up petition as it is required to include confirmation that the liquidator has benefits of professional indemnity insurance meeting the requirements of the IPRs. Based on the above facts, it is highly likely that the Grand Court will not appoint the chosen provisional liquidator. (1)

4 marks, good concise answer

Question 3.2

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

In accordance with section 91B (1) of the Companies Act, a company must present a Restructuring Petition to the Grand court for the appointment of a restructuring officer or officers. In order to be eligible for the appointment of a restructuring officer the company must demonstrate that:

1. It is or is likely to become unable to pay debts or, (1)
2. It 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)

Restructuring Petitions should be advertised in accordance with Form Number 3A of the CWR which requires that the Restructuring Petition is advertised:

1. Once in a newspaper that is circulated in the Cayman Islands; and (1/2)
2. In a newspaper circulated in a country/country that is most likely to gain the attention of creditors and contributories. (1/2)

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Commented [BB24]: Question 3.3 - Sub-total = 1/2

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)

The Companies (Amendment) Act and the Amendment rules provide the following safeguards to preserve and protect the interests of creditors and contributories.

1. A creditor may apply to the court for a variation or a discharge of an order appointing restructuring officers by way of summons. This provides protection for creditors who are not on agreement of the terms of the appointment. (1)
2. A creditor may also apply to the Court for the removal and or replacement of a restructuring officer. This provides options to creditors who do not agree with the appointed IP. (1)
3. Creditors who have security over the whole or part of the assets can still enforce that security without the leave of the Court and without reference to a restructuring officer. This means that the restructuring appointment does not impact the enforcement rights of the secured creditor. (1)
4. Creditors may present a winding up petition in respect of the company after a presentation of a restructuring petition has taken place, with leave of the court. The court may hear the winding up petition and the Restructuring petition concurrently.

The rules also provide that the restructuring officers fulfill certain disclosure and reporting obligations to creditors to ensure that the creditors are adequately informed throughout the process (1). For example, restructuring officers must give notice of their appointment in a manner that the court directs and may be ordered to:

- (a) Convene meetings of creditors and members
- (b) Provide reports about the financial condition of the company.

4 marks - other suggestions below

- 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 iPLs) - 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)

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- The hearing must be heard within 21 days of presentation (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)

Question 3.5

Commented [BB26]: Question 3.5 - Sub-total = 5/5

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

In accordance with section 91B (3) of the Companies Act (2023 revision), upon hearing of Restructuring Petition, the court has the power to:

- Make an order to appoint the restructuring officer. (1)
- Adjourn the hearing conditionally or unconditionally. (1)
- Dismiss the petition or; (1)
- Make any order that the Court sees fit. (1)

In section 91B(3) (d), it is further explained that the court cannot make an order to place the company in an official liquidation as a result of the restructuring petition (1). This option is only available to the court if the appropriate winding up petitions have been made.

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)

The formation and operation of ELPs in the Cayman Islands' is governed by the following:

- The Partnership Act (2013 Revision) (1)
- The Exempted Limited Partnership Act (2021 Revision) (1) and the principles of common law and equity applicable to partnerships (1 mark)

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Question 4.2

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

According to section 91(d) of the Companies Act, the Cayman Islands Court has jurisdiction to wind up a foreign company in the following circumstances:

1. The foreign company has property in the Cayman Islands
2. The foreign company is carrying on business in the Cayman Islands
3. The foreign company is the general partner of an ordinary limited partnership or an ELP; or
4. The foreign company is registered under Part IX of the Companies Act.

Commented [sp28]: 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)

Foreign judgements of foreign courts can be relied upon as the basis for seeking a winding up order so long as the following conditions are present:

1. The judgement is final and conclusive in the foreign court.
2. The judgement was obtained in a court of law that had the appropriate jurisdiction over the debtor.
3. The judgement was not obtained by fraud.
4. The judgement was not in relation to taxes, fines, or penalties.
5. The enforcement of the judgement does not contravene Cayman policies.
6. The rules of natural judgement were observed.

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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

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

In the event of Bankruptcy, property of debtors is immediately passed to, and vests in, the Trustee. Until a provisional order has been made, the duty of the Trustee is to preserve the property so that it may be returned to the debtor should the provisional order be revoked.

If it is necessary, the Trustee may also carry on the trade of the debtor and may bring/defend any legal proceedings relating to the property of the debtor. **(½)**

The Trustee also has the power to accept or reject proof of debts **(1)** as set out in section 31 of the Grand Court (Bankruptcy) Rules.

Lastly, upon an absolute order, the Trustee must proceed to administer the debtor's estate for the benefit of creditors. **(1)**

Your answers were very vague and needed more detail - you lost a further mark for not referring to the relevant section of the bankruptcy act in one of your examples - please see model answer below:

Answer is at 7.7 of the course notes. Preserve / collect property. **(1 mark)** Adjudicate proofs of debt. **(1 mark)** Administer the estate. **(1 mark)** For example ... **(1 mark for examples)**

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

The Trustee may 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).

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

The Trustee must receive and adjudicate the proof of debts (section 87).

Once an absolute order has been made, the Trustee must proceed to administer the debtor's estate for the benefit of the creditors (section 65).

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****

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