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

Commented [BB1]: TOTAL = 86/100 -  
Excellent results, well done!

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

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

All candidates are expected to comply with ALL the instructions.

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## 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)

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

#### Question 1.1

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

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

#### Question 1.2

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

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

#### Question 1.3

Choose the **correct** statement:

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

- (a) 3

(b) 5

(c) 6

(d) None of the above

**Question 1.4**

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

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

**Question 1.5**

Choose the **correct** statement:

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

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

**Question 1.6**

Choose the **correct** statement:

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

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

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

- (d) Within 7 days of the appointment.

**Question 1.7**

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

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

**Question 1.8**

Choose the **correct** statement:

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

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

**Question 1.9**

Choose the **correct** statement:

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

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

**Question 1.10**

Choose the **correct** statement:

A scheme of arrangement:

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

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

**Question 1.11**

Select the **incorrect** statement:

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

**Question 1.12**

Choose the **correct** statement:

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

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

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

**Question 1.13**

Select the **correct** statement:

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

**Question 1.14**

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

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

**Question 1.15**

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

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



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

**Question 1.16**

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

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

**Question 1.17**

Select the **correct** statement:

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

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

**Question 1.18**

Choose the **correct** statement:

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

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

**Question 1.19**

Select the **correct** statement:

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

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

**Question 1.20**

Select the **correct** statement:

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

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

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

**QUESTION 2 FOLLOWS ON NEXT PAGE / ...**

## QUESTION 2 - LIQUIDATION (45 MARKS)

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

### FACT PATTERN

#### BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

### Question 2.1

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

Whitesand will need to refer to Order 4 Rule 4(1) of the Companies Winding Up Rules (2023 Revision) (referred to as CWR from herein) in order to ensure that the content of the consent to act affidavit contains the following features:-

Qualification - Confirmation that the proposed official liquidator is a qualified insolvency practitioner in accordance with the Insolvency Practitioners' Regulations (2023 Revision) (referred to as IPR from herein).

Residency - Confirmation that the proposed official liquidator complies with the residency requirement in Regulation 5 of the IPR.

Independence - A statement that having looked into the matter, the proposed official liquidator believes that he and his firm are independent in accordance with Regulation 6 of the IPR.

Insurance - A statement that the proposed official liquidator has the requisite insurance in accordance with Regulation 7 of the IPR.

Finally, the proposed official liquidator needs to confirm he is willing to act if appointed.

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)

Regulation 6 of the IPR (1) provides that a qualified insolvency practitioner will not be regarded as "independent" if 3 years prior to the appointment either he or the firm within which he is a partner or an employee has acted as an auditor to the company that is proposing to appoint him (1). As such, the proposed liquidators would not meet the independence requirement. (1)

If the information came to light after the consent to acts has been provided, then the proposed liquidators would still need to bring the lack of independence to the attention

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

Commented [BB5]: Question 2.2 - Sub-total = 4/5

of the client and the Court so that the liquidators can be replaced on the grounds that the independence requirement has not been met. (1)

4 marks

### Question 2.3

Commented [BB6]: 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)

Section 120 of the Companies Act (2023 Revision) (referred to herein as the CA) provides that a voluntary liquidator does not need any professional qualifications to act as such. This means that Tom and Jerry do not need any specific qualifications to act. (1)

#### Question 2.3.2 (2/2 marks)

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

CA 123 provides that (1) Within twenty-eight days of the commencement of a voluntary winding up, the liquidator or, in the absence of any liquidator, the directors shall- (a) file notice of the winding up with the Registrar; (b) file the liquidator's consent to act with the Registrar; (c) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought); (d) in the case of a company carrying on a regulated business, serve notice of the winding up upon the Authority; and (e) publish notice of the winding up in the Gazette. (2)

#### Question 2.3.3 (2/2 marks)

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

O 13, r 9 (2) CWR provides that the company may resolve to remunerate Tom and Jerry as voluntary liquidators on the basis of

- a. An hourly rate;
- b. A fixed sum;
- c. A commission or percentage of assets realized; or
- d. A combination of these methods. (2)

**Question 2.4 (0.5/2 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)

I am not sure if this question is asking what the Court can do upon an application for the provisional liquidators to be appointed or upon the actual hearing of the winding up petition post the appointment of the provisional liquidators.

If it is the former, the Court upon hearing the application for the appointment, the Court can appoint the provisional liquidators if it is found that the statutory requirements for the appointment of provisional liquidators are met in accordance with section 104(2) CA. The Court would then have a general discretion to grant the provisional liquidators the powers they need to prevent dissipation, misuse, mismanagement and misconduct in respect of the Company and to ensure the Company's assets are protected until the winding up petition is heard.

Once the provisional liquidation comes to a close and the provisional liquidators have fulfilled their role, they can apply to have their appointment discontinued. If the company's position is secure, the original petitioner may have the winding up petition withdrawn and that the company may resume to trading. However the Court could also put the Company into liquidation.

**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)

The removal of official liquidators is dealt with in Section 107 of the CA and states that "An official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company".

Case law also provides that the only parties who may apply to remove an official liquidator are those who have an interest in the liquidation, namely the creditors (in an insolvent liquidation) and contributories (in a solvent liquidation).

**Commented [BB7]:** Question 2.4 - Sub-total = 0.5/2

**Commented [ni8]:** this question asks what the Court's powers are 'upon the hearing of a **winding up petition**' not upon the hearing of a PL application. Therefore you have not answered the question correctly I'm afraid. I am giving you 0.5 marks for what would have been a good answer to the question "what would have been the court's powers upon the hearing of a PL application?"

**Commented [BB9]:** Question 2.5 - Sub-total = 8.5/9

**Commented [ni10]:** good answer

Order 5 of the CWR deals with the application for the removal of an official liquidator. The application must be made by summons (CWR Order 5 Rule 6(1) which should be served on the official liquidator, each member of the liquidation committee, counsel for the liquidation committee (if applicable), and any other creditors or contributories as directed by the Court. The summons must also nominate a qualified insolvency practitioner who the Court can appoint in succession to the removed liquidator, and every person so nominated must swear an affidavit that complies with CWR Order 3 Rule 4 (the usual consent to act provisions).

The summons should be supported by an affidavit setting out all of the facts and matters relied upon.

The official liquidator should be given 14 days' notice 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)

In cases such as BTU Power Company 2019 (1) CILR Note 7, the Court mentions that creditors in the case of an insolvent liquidation and contributories in the case of a solvent liquidation are the only proper persons to make an application because it is those parties in those circumstances who have the ultimate interest in the company's assets. In an insolvent liquidation, the contributories have no interest in the liquidator etc as any recoveries will not go to them. In a solvent liquidation, the creditors have no interest because they are not seeking to get paid and it is the contributories who have the interest. As such, the applicant to a removal application must show that he is qualified to make the application and has a legitimate interest in the relief sought.

**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)

As a starting point, in accordance with Order 9 rule 1(3) CWR, the liquidation committee shall comprise not less than three nor more than five creditors (if the official liquidator has determined that the company insolvent) or contributories (if the official liquidator has determined that the company solvent). If the company is now deemed solvent, this means that the liquidation committee shall not have less than three nor more than five contributories so that will be a change to the composition of the liquidation committee.

**Commented [ni11]:** good answer. Could have done with a little clearer explanation, but you evidence a sound grasp of the principles.

**Commented [ni12]:** because they will get paid in full

**Commented [ca13]:** Question 2.6 Subtotal = 4/4 marks



Order 9 Rule 3 CWR deals with the reconstitution of the liquidation committee if, during the course of the liquidation, the official liquidator changes the status of the solvency of the company. If the company is certified to be solvent, any members of its liquidation committee who are creditors shall cease to be members automatically and the official liquidator shall convene a meeting of contributories to elect new members from amongst the company's contributories.

### Question 2.7

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

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

Order 22, rule 2 (3) of the CWR provides that the official liquidator must file the order for dissolution with the Registrar of Companies within 14 days from the date upon which the order is perfected.

Order 22 rule 4 of the CWR provides that an order for dissolution must include supplementary directions relating to:

(a) the retention of the whole or part of the liquidation files for longer than the minimum period of three years as specified in Order 25, rule 1;

(b) the retention, storage and destruction of the company's books and records pursuant to Order 25, rule 2 in addition to any other matters that the Court deems fit.

This means that the liquidator will need to act in accordance with any of the provisions of the dissolution order in respect of the company's files etc.

The liquidator will also need to undertake the necessary steps to make arrangements in respect of unclaimed dividends and undistributed assets are to be dealt with in accordance with section 153 of the Companies Act and Order 23 of the CWR.

Following the dissolution of a company, the liquidator must retain the liquidation files in safe custody for at least three years (CWR Order 26 r2(2) and (3) provide details of what should be included in the liquidation files.

Order 26, rule 3(4) and (6) of the CWR provides that directions will be given for preservation, storage and destruction of the company's remaining books and records.

In summary, once the dissolution order is made, the official liquidator's duties as officeholder come to an end apart from anything in the dissolution order itself with respect to the preservation, storage and destruction of the company's files and also dealing with unclaimed dividends/property etc.

### Question 2.8

Commented [BB15]: Question 2.8 - Sub-total = 4/5

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

Section 102 (1) CA deals with the empowerment of the official liquidator to investigate, if the company has failed, the reasons for the failure of the company and generally the promotion, business, dealings, and affairs of the company and to report these to the Court as the official liquidator deems fit. (1) Cite case law to substantiate your answer ie 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)

Section 102 (2) CA provides that subject to the directions of the Court the official liquidator may also have the power to (a) assist CIMA or Royal Cayman Islands Police Service (1) to investigate the conduct of persons listed in section 101(3) CA namely directors, officers, professional service providers, and fairly recent employees of the company and (b) institute and conduct a criminal prosecution in respect of the same. (1)

The costs of the investigation, subject to the prior approval of the company's creditors or contributories (as applicable) may be paid out of the assets of the company in accordance with 102(2) CA.

In accordance with Section 103 (3) CA also provides for the liquidator to make an application for certain persons such as directors, officers and professional service providers to be examined orally or deliver up certain property or documents. (1)

#### Question 2.9

Commented [BB16]: Question 2.9 - Sub-total = 5/5

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)

The "relevant date" means the commencement of the winding up. (1)

This could be the date of the presentation of the winding up petition. (1) In accordance with section 100(1) this could be an earlier date if, before the presentation of a petition for the winding up of a company by the court

- (a) A resolution was passed by the company for voluntary winding up, (½)
- (b) any period fixed for the duration of the company by the articles of association has expired, (½)
- (c) an event giving rise to a requirement to wind up the company in the articles of association has occurred, or (½)
- (d) a restructuring officer has been appointed. (½)

If any of these events have occurred, then the winding up is deemed to have commenced at the time of event listed above. (1)

Well done, good answer.

**\*\* 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 [BB17]: Question 3.1 - Sub-total = 4/5

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

The proposed provisional liquidator is based in Hong Kong (1) and is therefore a foreign practitioner for the purposes of the IPRs. Section 108(1) provides that a foreign practitioner may be able to act jointly with a qualified insolvency practitioner who is based in the Cayman Islands (1). Therefore as a starting point, the foreign practitioner cannot act alone without a local insolvency practitioner based in Cayman so that is the first thing to be rectified.

Even if the foreign practitioner is to act jointly, they need to comply with Regulation 7 (1) of the IPR in respect of insurance. This provides that 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). If the foreign practitioner is not willing to get this level of insurance then they are not able to act. (1)

**4 marks - just missing a cross reference between Regulation 8 of the IPRs and how that then links in Regulation 7 applying to foreign practitioners**

#### Question 3.2

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

The company must provide evidence to the Court in a similar vein to the test for "soft touch" liquidators in accordance with section 104(3) CA which is a two-limb test: that (i) a company is or is likely to become unable to pay its debts as they fall due (1), and (ii) the company intends to present a compromise or arrangement to its creditors. (1)

Early Court treatment of the restructuring regime in Re Oriente Group Limited confirmed that the previous cases on the interpretation of this test apply to the restructuring officer regime.

2 marks

#### Question 3.3

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

The restructuring petition is to be in accordance with CWR Form Number 3A and appear:

- (a) in accordance with CWR Order 1A 1(3) once in a newspaper having circulation in the Cayman Islands; (1/2)

Commented [BB18]: Question 3.2 - Sub-total = 2/2

Commented [BB19]: Question 3.3 - Sub-total = 2/2

(b) in accordance with CWR Order 1A 1 (4) if the company is carrying on business outside the Islands, in a newspaper having circulation in a country (or countries) in which the petition is most likely to come to the attention of the company's creditors and contributories. (½)

In accordance with CWR Order 1A 1(4) the advertisements are required to appear no more than seven business days after the filing of the restructuring petition (½) and not less than seven business days before the hearing date. (½)

#### Question 3.4

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

Variation and Discharge of the Appointment - (a) a creditor may apply to the Court for a variation or a discharge of an order appointing the restructuring officers by way of summons in CWR Form Number 16B. (1)

Removal and Replacement - (b) a creditor may also apply to the Court for the removal and replacement of a restructuring officer by summons in CWR Form Number 16C. (1)

Secured Creditors - (c) creditors with security over the assets of the company can enforce that security without the leave of the Court and without reference to the restructuring officer. (1)

Can Still Petition - (d) even after the presentation of a winding up petition, creditors may nevertheless present a winding up petition in respect of the company following presentation of a Restructuring Petition, with leave of the Court.

Claw Back and Preferences - (e) If the company is later wound up because the restructuring failed, the winding up will be deemed to have commenced on the date of the presentation of the Restructuring Petition, so official liquidators will be in a position to claw-back any preference payments made to creditors within the six months immediately preceding the presentation of the Restructuring Petition. This means that no creditor would be prejudiced by the lapse of time following the failed restructuring process.

Invalidated transactions - (f) If the restructuring process were to fail, any transactions that did not have the relevant validation in accordance with section 99 of the Companies Act would also fail and so creditors would not be prejudiced by those.

3 marks, see suggested model answers 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

Commented [BB20]: Question 3.4 - Sub-total = 3/6

appointment of provisional liquidator were to be made as a matter of course (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 RFLs) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (1 mark)
- A requirement for the RFLs to report - open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- The RFLs must report within 20 days of appointment (1 mark)

#### Question 3.5

Commented [BB21]: 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) CA, the Court may upon hearing a restructuring petition:-

- (a) make an order appointing a restructuring officer; (1)
- (b) adjourn the hearing conditionally or unconditionally; (1)
- (c) dismiss the petition (1)
- (d) make another order as the Court sees fit. (1)

The Court is not able to place the company into official liquidation (1) which is an order that the Court can only make in accordance with sections 92 and 95 of the CA if a winding up petition has been presented in accordance with sections 91G and 94 of the CA.

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)

Companies Act

Exempted Limited Partnership Act (2021 Revision) (1)

Exempted Limited Partnership Regulations (2021 Revision) (1) and the principles of common law and equity applicable to partnerships (1 mark)

Commented [BB22]: Question 4.1 - Sub-total = 2/3

##### Question 4.2

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

In Silicon Valley Bank (Cayman Islands Branch), In the Matter of (21Jul23), Doyle J confirmed the Cayman Court's jurisdiction to make a winding-up order in respect of a foreign company.

In March 2023, Silicon Valley Bank had been closed by the California Department of Financial Protection, and a Receiver had been appointed over the Bank's assets due to its inability to pay its depositors.

On 13 June 2023, a group of depositors petitioned to have the Cayman Islands branch of the Bank wound up on the ground that its failure to return their deposits of approximately US\$6m demonstrated its inability to pay its debts within the meaning of Section 93(c) of the Companies Act (2023 Revision).

The Court accepted that it has jurisdiction to wind up a foreign company in Cayman, pursuant to Section 91(d) of the Companies Act, in circumstances where it:

- has property located in the Islands;
- is carrying on business in the Islands;
- is the general partner of a limited partnership; or
- is registered as a foreign company under Part IX of the Companies Act.

Commented [sp23]: 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)

A judgment of a foreign court needs to be domesticated in the Cayman Islands so that it

Commented [sp24]: Question 4.3 - Sub total = 0/3



can be treated as a local judgment before it can be used as a basis for winding up a company. This is because until the foreign judgment is registered in Cayman it cannot be enforced by requesting the debtor to make payment. It is not until the debtor has been served with the judgment and requested to make payment that the non- of the debt can be used as evidence of the debtor being unable to pay its debts as they fall due and a winding up petition presented.

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

#### Question 4.4

Commented [BB25]: Question 4.4 - Sub-total = 4/4

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

Section 38 Bankruptcy Act - 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. (1)

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

Section 80 Bankruptcy Act - The Trustee may bring or defend any legal proceedings relating to the property of the debtor. (1)

Section 87 Bankruptcy Act - The Trustee must receive and adjudicate the proof of debts. (1)

Section 65 Bankruptcy Act - Once an absolute order has been made, the Trustee must proceed to administer the debtor's estate for the benefit of the creditors.

TOTAL MARKS: [100]

\*\* END OF ASSESSMENT \*\*