



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 84/100 -
Excellent results, well done!

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

EXAMINERS

Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers
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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

INSTRUCTIONS

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

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

Commented [BB2]: Question 1 - Sub-Total = 19/20

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

Question 1.1

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

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

Question 1.2

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

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

Question 1.3

Choose the **correct** statement:

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

- (a) 3

- (b) 5
- (c) 6
- (d) None of the above

Question 1.4

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

- (a) The company.
- (b) Any creditor.
- (c) Any prospective creditor.
- (d) Any contributory.
- (e) Any prospective contributory.

Question 1.5

Choose the **correct** statement:

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

- (a) KYD 50
- (b) KYD 100
- (c) KYD 1,000
- (d) KYD 10,000

Question 1.6

Choose the **correct** statement:

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

- (a) Within 21 days of the appointment.
- (b) Within 28 days of the appointment.
- (c) At such intervals as the Restructuring Officer considers appropriate.

- (d) Within 7 days of the appointment.

Question 1.7

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

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

Question 1.8

Choose the **correct** statement:

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

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

Question 1.9

Choose the **correct** statement:

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

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

Question 1.10

Choose the **correct** statement:

A scheme of arrangement:

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

Question 1.11

Select the **incorrect** statement:

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

Question 1.12

Choose the **correct** statement:

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

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

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

Question 1.13

Select the **correct** statement:

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

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

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

Question 1.20

Select the **correct** statement:

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

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

QUESTION 2 - LIQUIDATION (45 MARKS)

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

FACT PATTERN

BLUESEA DIGITAL CAPITAL LIMITED

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

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

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

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

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

Question 2.1

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

The required contents of the consent to act are laid in the Companies Winding Up Rules (2023 Consolidation) ("CWR") Order 3, rule 4(1). It is noted that the Consent to Act shall include the following statements (1):

- that person is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5 of the Insolvency Practitioners Regulations (2023 Consolidation) ("IPR") (1)
- that having made due enquiry, that person believes that that person and that person's firm meet the independence requirement contained in Regulation 6 of the IPR (1)
- that person and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7 of the IPR (1)
- that person is willing to act as official liquidator if so appointed by the Court (1)

It should be noted that the consent to act would come in the form of an affidavit sworn by the person, as opposed to the more prescribed form seen with Voluntary Liquidations.

A further consideration is where Whitesand wishes to appoint a foreign practitioner jointly with a Cayman practitioner. This may be a possibility for Whitesand given the international reach of Bluesea. Where this is the case, the consent to act shall state the following per CWR Order 3, Rule 4(2):

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

5 marks

Question 2.2

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

Commented [BB5]: Question 2.2 - Sub-total = 2/5

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)

Bodden and Ebanks are not able to act as liquidators in relation to Bluesea (1). This is on the basis of the Insolvency Practitioners Regulations (2023 Consolidation) ("IPR"), Regulation 6(1), (1) whereby an 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'
- insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, has acted in relation to the company as its auditor' (1)

Having consideration for the above, the proposed liquidators are by law not able to act as the Insolvency practitioners for the company, on the basis that they acted as auditors for Bluesea within the preceding 3 years before the commencement of the liquidation. (1)

There are also considerations regarding conflicts of interest that would likely breach the code of ethics for whichever member association the practitioner is part of. Given the fact pattern around allegations of fraud, there is a strong possibility they may be reviewing their own firm's audit work which would create a self-review threat and a conflict of interest that they would not be able to be remediated.

Given the above, Bodden & Ebanks would not be able to act as IPs to Bluesea and should take the necessary steps to resign. The steps to resign are laid out in the CWR Order 5, Rule 4, whereby an official liquidator must:

- Prepare a report and accounts. The exact requirements of the report are laid out in further detail in Order 10, Rule 2 of the CWRs.
- Give notice of their resignation to the company's liquidation committee
- Apply to the Court for an order that they be released from the performance of any further duties. The application must be served on each member of the liquidation committee, counsel to the liquidation committee, and any other creditors or contributories as directed by the Court.

Commented [j06]: A tad harsh so apologies, but the question itself talks about "proposed liquidators" ie between the hiatus period post petition pre hearing so the resignation stuff whilst what you've set out is correct is irrelevant. Inform the Court, rescind or withdraw their consents or similar would have got the final mark

4 marks

Question 2.3

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

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)

To act as voluntary liquidator requires no qualifications in the Cayman Islands. (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)

The statutory steps that they must undertake are laid out in section 123 of the Companies Act (2023 Revision) whereby they must:

- File notice of the winding up with the Registrar;
- File the liquidator's consent to act with the Registrar;
- File the director's declaration of solvency with the Registrar (if the supervision of the court is not sought); and
- Publish notice of the winding up in the Gazette. (2)

It is not indicated that the company is carrying on a regulated business, however, if the company is, the Liquidators should serve notice of the winding up upon the Cayman Islands Monetary Authority.

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)

Commented [BB7]: Question 2.3 - Sub-total = 5/5

There are 4 ways in which the company may resolve to remunerate the Joint Voluntary Liquidators (“JVLs”) per the Companies Winding Up Rules (2023 Consolidation) (“CWR”) which are outlined as follows:

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

It should be noted that should the voluntary liquidators be paid their remuneration out of the company assets that approval via a resolution at a general meeting of the company must be obtained.

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)

The Court’s powers upon the hearing of a winding-up petition are laid out in the section 95(1) of the Companies act and apply to the appointment of a provisional liquidator. The general powers are as follows:

- dismiss the petition;
- adjourn the hearing conditionally or unconditionally;
- make a provisional order; or
- any other order that it thinks fit

As it is the contributories that are due to petition the court, and given the facts of the case whereby the petition will likely be made on the grounds that it is just and equitable for the company to be wound up, Section 95(3) would also be relevant. This section provides the court jurisdiction to also make the following orders:

- an order regulating the conduct of the company’s affairs in the future;
- an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;
- an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or
- an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company’s capital accordingly.

These are useful powers given the concern around the conduct of the current liquidator of the company.

Question 2.5

Question 2.5.1 (4/4 marks)

Commented [BB8]: Question 2.4 - Sub-total = 2/2

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

Commented [ni10]: great answer

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 parties who can apply for the removal of official liquidator(s) are the creditors and contributories of the company. The circumstances by which these parties can apply to the court is dictated by the solvency of the company, whereby only a creditor can apply in an insolvent liquidation and only a contributory can apply in a solvent liquidation.

The basis for this is Section 107 of the Companies Act and Order 5 of the Companies Winding Rules., whereby it specifies these parties. It also has a basis in case law, namely Johnson and Deloitte & Touche AG [1997 CILR 120] whereby it was established that 'only persons with a positive financial interest in the outcome of a liquidation could apply to show due cause for the removal of a liquidator', ergo creditors and contributories.

The removal of an official liquidator is a high bar and must be demonstrated to the court. The case offers some ground for the removal of the Liquidator given the Liquidator's alleged involvement in defrauding other companies in liquidations, although this should be caveated without having full insight into the article and further details of the case in general. One concern would however be the lack of the support from the other shareholders, as this may indicate that it is not 'the general advantage of the majority of the persons in the liquidation', a consideration of the court in the case of Johnson and Deloitte & Touche AG [1997 CILR 120].

Taking the 'application' as being the removal summons, Order 5, Rule 6(2) of the CWR requires that the application be served upon:

- The official liquidator;
- Each member of the liquidation committee
- Counsel for the liquidation committee (where applicable); and
- Any other creditors or contributories as may be directed by the court.

Question 2.5.2 (5/5 marks)

Commented [ni11]: also a great answer

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

The fundamental principle behind this relates to who has a financial interest in the outcome of the liquidation. It follows that those who have a financial interest should be allowed to affect key decisions surrounding the liquidation, including the removal of the official liquidator.

The question of who has a financial interest in the outcome of the liquidation will vary based on, in this case, the Company's solvency. Whereby a company is solvent, the creditors do not have an economic interest in the outcome of the solvency, as by definition, all amounts owed to them are expected to be met. In a solvent liquidation, a variable level of returns could be expected by the contributories, as such, it makes sense

that the contributories should influence key decisions that may affect said returns, such as the removal of the liquidators.

However, where a company is insolvent, the contributories have had their equity wiped out and as such, no longer have an economic interest in the outcome of the solvency. Barring a change in solvency, no returns would be expected to the contributories, and they cannot be said to have an economic interest in the company. The creditor would however be subject to a potentially varied level of returns, as such it follows that they have the ability to influence decisions that will affect these returns, again such as the removal of the liquidators.

This was established in the case of Johnson and Deloitte & Touche AG [1997 CILR 120] whereby 'only persons with a positive financial interest in the outcome of a liquidation could apply to show due cause for the removal of a liquidator'. This was also established in the case of BTU Power company 2019, whereby the court denied a former director the removal of joint official liquidators on the basis of lacking a 'legitimate interest'.

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 Liquidation committee is formed to represent the interest of economic stakeholders. Given that the company is solvent, it stands that creditors no longer have an economic interest in the outcome of the liquidation. As outlined in CWR Order 9, Rule 3(2), in situations where the company is certified as solvent, all creditor members will automatically cease to be members. Following this the Liquidator should convene a meeting of contributories in order to elect new members of the committee from the company's contributories. Overall, the Liquidation Committee's constitution of members will be revised to represent the economic interest of the stakeholders.

The numbers of contributories that should be represented on the Liquidation Committee will be governed by Order 9, Rule 1(3) of the CWR such that the Liquidation Committee shall be comprised of 3 to 5 contributories, provided that there are sufficient numbers to meet lower threshold.

Question 2.7

Commented [ca12]: Question 2.6 Subtotal
4/4 marks

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

The steps that must be taken following the making of an order for dissolution are laid out in the Companies Winding Up Rules (2023 Consolidation) as follows:

- The Liquidator must file the order for dissolution with the Registrar of Companies within 14 days from the date upon which the order is perfect. This is merely a procedural step and helps to ensure that ROC is up to date with the status of Companies.
- Take steps in order to retain the liquidation files for longer than minimum period of 3 years and take steps related to the retention, storage and destruction of the company's books and records. These steps are both important
- Where any unclaimed dividends or undistributed assets exist and where the liquidator will act as trustee, carry out the necessary steps with respect to these assets.

With respect to this final step noted above, certain of the assets of the company may have gone unclaimed in which case there is a degree of managing these assets post the liquidation. Management of the assets is laid out in section 153 of the Companies Act and Order 23 of the CWR, and include but are not limited to:

- The setting up of a trust account for those assets
- Transferring the title of the assets from the Liquidator to be held in trust and administered by the creditor however for the benefit of the creditors or contributories
- In the event that the beneficiaries are found, arrangement of the payment of funds or assets out of the trust account

After a year's duration has elapsed since the end of the liquidation, remaining funds and assets can be transferred to the financial secretary.

Question 2.8

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

In respect of official liquidations, the general investigatory powers are prescribed throughout the Companies Act. One such power laid out Section 101(1) of the Companies Act (2023 Consolidation) is the ability to obtain a statement of affairs for particular persons, including directors or officers of the company, those who have been professional service providers and those persons who or have been employees of the company for at least one year prior to the relevant date. (1) Details which can be obtained by the statement of affairs and which are included in more depth in Section 101(2) include information relating to the assets and liabilities of the company.

In the case of Bluesea, this may be useful in determining the history related to its deposit

Commented [ca13]: Question 2.7 Subtotal = 5/5 marks

Commented [BB14]: Question 2.8 - Sub-total = 3/5

and possible retrieval. Additionally, any information obtained via a statement of affairs may be useful if any claims are made against the individual, including but not limited to those involved in the company. The statement of affairs is also useful in this case as there appears to potentially be a lack of financial information given that only one audit has been conducted.

Taking duties of a liquidator to mean duties in so far as investigations are concerned, it should be noted that section 102(1) of the Companies Act empowers the liquidator to investigate the causes of failure, where a company has failed, and the promotion, business, dealing and affairs of the company. (1) However, the use of 'empower' implies less than a duty.

Further powers of the liquidator include the power to apply to the court for an order for the examination of a relevant person (relevant person being defined in Section 103(1) of the Companies Act) and that a 'relevant person transfer or deliver up to the liquidator any property or documents belonging to the company'. (1) Similar with the statement of affair, this may be useful in gathering information around the missing deposit or using in claims against individuals at later dates.

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 definition of relevant date in the Companies Act (2023 Revision) depends on whether or not a provisional liquidator is appointed in the case. Where a provisional liquidator is appointed, the relevant date will be the date of the liquidator's appointment as defined by Section 101(2)(6)a of the Companies Act. In the case where a provisional liquidator is not appointed i.e. any other case, the relevant date is the commencement of the winding up **(1)** as defined by Section 101(2)(6)a of the Companies Act.

This has relevance to the liquidator's ability to procure a statement of affairs from current or former employees, as per Section 101(3)(c), a statement of affairs can only be obtained from former employees, where they have been an employee prior to one year preceding the relevant date.

This provision in the Companies act has also been made as a provisional liquidation does not enter winding up and thus would require this tailoring to afford the provisional liquidation investigative powers in so far as former employees are concerned.

Please see model answer below:

In the context of an official liquidation (noting that this section also applies to provisional liquidators), the relevant date for the purposes of section 101 means the commencement of the winding up. **(1 mark)** In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)). **(1 mark)** However, this is subject to section 100(1), which provides that the commencement of the winding up may be an earlier date if, before the

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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)

The chosen provisional liquidator would not be able to be appointed by the Grand Court of the Cayman Islands (1). This is on the basis of a failure to comply with the legislation per Insolvency Practitioners Regulations (2023 Consolidation) Part II, Regulation 7 (1), which make reference to the insurance requirements. The requirements are made clear whereby an official liquidator must have professional indemnity insurance 'up to a limit of at least US\$10 million in respect of each and every claim and at least \$US20million in the aggregate, with a deductible of not more than \$US1million'. (1)

Whilst the IPR make reference only to official liquidators, it should be noted that the provisional liquidators fall under the category of official liquidator as defined by the Companies Act (2023 Revision). This is included in Part V, 89 Definitions whereby "official liquidator" means the liquidator of a company which is being wound up by order of the Court or under the supervision of the Court and includes a provisional liquidator.

As the chosen provisional liquidator fails to meet the requirements of at least \$10 million in respect of each and every claim, the Grand Court cannot appoint the chosen provisional liquidator (1). There is not enough information to comment on whether the chosen provisional liquidator meets the other thresholds with respect to indemnity insurance.

3 marks - extra marks would have been obtained for mentioning the relationship between Regulation 8 of the IPRs and Regulation 7 of the IPRs - and that being the primary reason why the insurance legislation also applies to foreign practitioners

Question 3.2

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

Per the Companies Act (2023 Revision) 91B(1) a company must demonstrate:

- That a company is or is likely to become unable to pay its debts as they fall due; and (1)
- Intends to present a compromise or arrangement to its creditors (or classes thereof) (2)

Whilst it is likely that the company would meet the requirements of the first limb of the test, it may face problems with the second limb of the test. This is on the basis of the reluctance of the creditors holding the guarantee liabilities to endorse any proposed restructuring scheme.

2 marks

Question 3.3

Commented [BB17]: Question 3.2 - Sub-total = 2/2

Commented [BB18]: Question 3.3 - Sub-total = 2/2

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

The advertising requirements for a restructuring petition are prescribed in the Companies Winding Up Rules (2023 Consolidation), namely Order 1A, Rule 1. The key requirements are as follows:

- every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. (½) An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.
- unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (½)
- The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court (½) and not less than 7 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)

There are a number of elements that exist to protect and safeguard the interests of creditors, some of which have been carried over from protections afforded in provisional liquidations and official liquidations. These protections have been listed below:

1. The first protection relates to secured creditors, whereby they can pursue recovery of their security without involvement of the court. This is an important protection given secured creditors unique position in being tied to a specific asset. (1)
2. At the hearing of the petition to appoint a restructuring officer, creditors may appear and be heard by the judge, thus allowing for creditors to have their own views and interests factored into the appointment decision. (1)
3. Where a restructuring petition appears unfeasible, creditors may file a winding up petition. This can be scheduled to coincide with the hearing of the restructuring petition. This maintains an important alternative avenue which may be in the better interests of creditors or certain classes of creditors.
4. As with official liquidators, restructuring officers operate under the supervision of the court and only have access to certain powers as the court may grant them. As such, restructuring officers are not provided with unchecked powers in their appointment and retain accountability to the courts. (1)
5. Creditors retain the right to remove or change an order appointing a restructuring officer by applying to the court. This offers an important potential remediation where a restructuring officer no longer appears to be in the best interests of stakeholders or appears to be unviable. (1)

Commented [BB19]: Question 3.4 - Sub-total = 4/6

These may be important powers afforded in this case to the holders of the guarantee liabilities, given their lack of interest in the restructuring. Whilst their views are not fully presented in the fact pattern, given the likelihood of insolvency, they may feel that their interests lie in a winding up the company and seek to oppose the restructuring petition. In this they may for instance, attend the restructuring petition and have it registered that they are opposed to the appointment of a restructuring officer. They may even try to having a windup order heard at the same hearing of the restructuring petition.

4 marks - see additional points below that would have scored

- The default position is that a Restructuring Petition will be heard on notice to stakeholders (while the prior statutory framework provided that applications for appointment of provisional liquidators were to be made *ex parte* by default? (1 mark)
- The same advertising requirements are imposed as applicable to a winding up petition (the prior regime did not require advertisement of an application to appoint JPLS) - no more than seven business days after the filing of a Restructuring Petition and not less than seven business days before the hearing date (1 mark)
- Heightened evidential requirements for the affidavit in support including the need to explain how the company will be funded during the restructuring period and why it is in the best interests of creditors (1 mark)
- The hearing must be heard within 21 days of presentation (1 mark)
- A requirement for the ROs to report - open and transparent process (1 mark)
- The petitions shall be heard in open court unless the Court otherwise directs (1 mark)
- The ROs must report within 28 days of appointment (1 mark)

Question 3.5

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

The relief available to the court is laid out in Section 91B(3) of the Companies Act (2023 Revision). Per this section of the Companies Act, the relief includes the following:

- The Court may make an order appointing a restructuring officer; (1)
- The Court may adjourn the hearing conditionally or unconditionally; (1)
- The Court may dismiss the petition; or (1)
- The Court may make any other order as the Court thinks fit. (1)

With respect to the final relief/power, this does not include the power to order the company into official liquidation (1). This relief is not granted as it would be an overextension of the court's powers and is a decision that is best taken by stakeholders of the company. This relief is also important to allay any concerns that in pursuing a restructuring, the company is inadvertently placed into liquidation.

5 marks, all spot on

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

Question 4.1

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

In addition to any Limited Partnership Agreement, ELPs are also subject to the Partnership act (2013 Revision) (1) and Exempted Limited Partnership Act (2021 Revision) (1) ("ELP Act"). It should be noted the ELP act makes reference to that fact that principles of common law and equity that partnerships are subject to also apply to ELPs. (1)

Where a court order for winding up and dissolution of ELPs is undertaken, Part V of the Companies Act and CWR will come into effect. This also applies to Voluntary Liquidations however to a lesser degree. However, it should be noted that the ELP act will take precedence where there discrepancies exist between the ELP act and the Companies act.

Question 4.2

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

The basis of winding up a foreign company by the Cayman Islands Court is laid out under Section 91(d) of the Companies Act which states that the Court has jurisdiction where a foreign company:

- Has property located in the Cayman Islands;
- Is Carrying on business in the Cayman Islands;
- Is the General Partner of an ordinary limited partnership or an ELP; or
- Is registered under Part IX of the Companies Act

This is the Cayman Islands court's jurisdiction in so far as it is codified in law. There are, however, practical considerations with respect to dealing with competing international jurisdictions which will limit the extent of powers related to a winding up of a foreign company. This may be the case where there are competing winding up petitions or liquidation proceedings.

Typically, the Cayman Island courts treat the country in which a company is incorporated in as the primary court, although this may run into conflict with other courts who operate under the Centre of Main Interest (COMI) model.

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

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Commented [sp22]: Question 4.2 - Sub total = 4/5

Commented [sp23]: Question 4.3 - Sub total = 2/3

reasons.

(3)

No, the judgement of a foreign court does not necessarily need to be registered or enforced before being relied upon as the basis of a winding up order. A judgement of a foreign court may serve as the primary basis for seeking a winding up order and can be presented as part of a winding up petition to the Cayman Islands Court. In this case a Cayman Islands judge will consider the winding up petition which includes the foreign judgement, on its own merits, irrespective of whether the judgement has been registered or enforced within the Cayman Islands. It may present a stronger case for a winding up order if the judgement is enforced or registered but it is not necessary prerequisite.

Moreover, the countries which are able to register or enforce a foreign judgement in the Cayman Islands is limited to such a select few jurisdictions, it would be impractical for the Cayman Islands Courts rely on the registration and enforcement of judgement of foreign courts in order to maintain its status as a creditor friendly international jurisdiction.

Question 4.4

Commented [BB24]: 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)

A trustee is provided a number of powers and duties per the provisions of the Bankruptcy act. These main powers and duties are respectively laid out in Section 79, 80, 87 and 65 of the Bankruptcy act and include the following: (1)

- The Trustee may carry on the trade of the debtor so far as may be necessary or expedient for the beneficial winding up or sale of the same, and for that purpose, or for the general management and realisation of his property, employ the debtor himself or any other person or persons.
- The Trustee may bring, institute or defend any action or other legal proceedings relating to the property of the debtor. (1)
- The Trustee shall receive and decide on proof of debts (1)
- When an absolute order for bankruptcy has been made against a debtor the Trustee shall proceed to administer the debtor's estate for the benefit of the creditors subject to this Law (1)

These are the main powers and duties in so far as laid out by the Bankruptcy act, although it should be noted that further powers are laid out in Bankruptcy act, namely Part XIV relating to the Administration of a Debtor's estate.

TOTAL MARKS: [100]

**** END OF ASSESSMENT ****