



**INSOL**  
INTERNATIONAL



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

Commented [BB1]: TOTAL = 73.5/100 - mark adjusted to 75/100

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

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**EXAMINERS**

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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)

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

#### Question 1.1

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

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

#### Question 1.2

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

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

#### Question 1.3

Choose the **correct** statement:

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

- (a) 3

Commented [BB2]: Question 1 - Sub-Total = 17/20

(b) 5

(c) 6

(d) None of the above

**Question 1.4**

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

(a) The company.

(b) Any creditor.

(c) Any prospective creditor.

(d) Any contributory.

(e) Any prospective contributory.

**Question 1.5**

Choose the **correct** statement:

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

(a) KYD 50

(b) KYD 100

(c) KYD 1,000

(d) KYD 10,000

**Question 1.6**

Choose the **correct** statement:

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

(a) Within 21 days of the appointment.

(b) Within 28 days of the appointment.

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

- (d) Within 7 days of the appointment.

**Question 1.7**

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

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

**Question 1.8**

Choose the **correct** statement:

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

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

**Question 1.9**

Choose the **correct** statement:

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

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

**Question 1.10**

Choose the **correct** statement:

A scheme of arrangement:

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

Commented [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.

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

#### Question 1.13

Select the **correct** statement:

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

#### Question 1.14

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

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

Commented [BB5]: The correct answer is (d)

#### Question 1.15

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

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



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

**Question 1.16**

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

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

**Question 1.17**

Select the **correct** statement:

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

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

**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)

As part of the petition to wind up Bluesea, the consents to act signed by the proposed official liquidator(s) much contain the following confirmations: (1)

- 1) That the proposed liquidator is a qualified insolvency practitioner and meets the residency requirements (referred to in regulation 5); (1)
- 2) having made the necessary enquiries, they believe that they, as well as their firm, meet the independence requirements (referred to in regulation 5); (1)
- 3) that they, and their firm, are compliant with the insurance requirement (referred to in regulation 7); and (1)
- 4) they are willing to act as Official Liquidator if appointed by the court. (1)

If, for any reason, Whitesand chooses to appoint a foreign practitioner, then that practitioner will be required to confirm the following in their own affidavit:

- 1) their professional qualifications;
- 2) the country in which they are qualified to perform functions equivalent to those performed by official liquidators in the Cayman Islands;
- 3) their professional experience
- 4) that they will have the benefit of professional indemnity insurance in respect of their acts and omissions done in their capacity as official liquidator of the company - meeting the requirements of regulation 7.

**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)

Under Regulation 6(2) (1) of the Insolvency Practitioners Regulations (2023 Revision), a qualified insolvency practitioner shall not be regarded as independent if they or their firm have, within a three-year period immediately preceding the commencement of their

Commented [BB6]: Question 2.1 - Sub-total = 5/5

Commented [BB7]: Question 2.2 - Sub-total = 3/5

appointment/the liquidation acted as auditors to the company. (1)

As Bodden & Ebanks Limited acted as auditors within the defined period, the proposed liquidators will be required to declare their interest and withdraw their consent to act. (1)  
Whitesand will be required to put forward alternative persons for appointment.

3 marks, model answer below.

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

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

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

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

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

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

### Question 2.3

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)

Commented [BB8]: Question 2.3 -Sub-total = 5/5

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

Anyone is able to act as a voluntary liquidator, there are no requirements for qualifications. (1)

### Question 2.3.2

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

As per the Companies Act, Tom and Jerry (as Voluntary Liquidators) must, within 28 days of their appointment:

- 1) file a notice of winding up (CWR Form No.19) with the Registrar of Companies;
- 2) File the voluntary liquidator's consent to act (CWR Form No. 20) with the Registrar of Companies;
- 3) If regulated (which in this case it should be), send copies of the above forms to the relevant authority; and
- 4) Publish the notice of winding up (CWR Form No.19) in the Gazette. (2)

With this being a voluntary liquidation, the liquidators should ensure that the declaration(s) of solvency is/are completed by the director(s) and subsequently filed with the Registrar of Companies.

Should a declaration of solvency not be received, the liquidators should file with the Registrar of Companies a notice stating that a supervision petition has been presented to the Court. (CWR Form No.22)

### Question 2.3.3

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

As Voluntary Liquidators, Tom and Jerry may be remunerated from the company's assets on the following bases:

- 1) An hourly rate for the time spent and properly devoted to the liquidation. Each level of employee working on the case will have a different hourly rate;
- 2) A fixed amount;
- 3) A percentage of the amounts realised or distributed; or
- 4) A combination of all three. (2)

Before payment, Tom and Jerry will need their fees approved via resolution at a general meeting of the company.

Should the liquidators prepare a final report and accounts for the final meeting

and the members do not attend or vote in person/via proxy, then they may be remunerated for the amount disclosed in the report. Alternatively, the liquidators may be remunerated without the consent of the members if they have the consent of court.

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

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

Upon the hearing of a winding up petition, the Court is able to:

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

**Question 2.5**

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

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

An application to remove an Official Liquidator from office can be presented to the court by a creditor or contributory of the company. If the company in liquidation is solvent, then this can be done by a contributory, whereas if the company is insolvent, this can be done by a creditor.

The application for an order that the official liquidator be removed is referred to as a "removal summons" and must also nominate a qualified insolvency practitioner.

Along with the removal summons, the applicant must provide an affidavit containing the facts and matters relied upon when making the application.

This removal summons must be served upon:

- 1) The official liquidator; and
- 2) Each member of the liquidation committee; or
- 3) Counsel for the liquidation committee, if an attorney has been appointed by the committee with the authority to act generally; and
- 4) Such other creditors or contributories as a court may direct.

The official liquidator must be given at least 14 days' notice of a removal summons.

**Commented [BB9]:** Question 2.4 - Sub-total = 2/2

**Commented [BB10]:** Question 2.5 - Sub-total = 6/9

**Commented [ni11]:** Good answer, but the other 2 points required an explicit mention of s.107 of the Companies Act and O.5, r.6 of the CWR



**Question 2.5.2 (4/5 marks)**

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

Depending on whether the company is solvent or insolvent, the distribution of assets will impact creditors and contributories differently.

If the company is solvent, it is a requirement that the creditors are first paid off in full prior to any distributions to contributories. In this case, it is in the interest of contributories to ensure that the liquidators maximize the amounts available after settling the company's debts. The creditors on the other hand must require paying in full regardless of how much is then paid out to contributories, therefore they will have little interest in how the liquidation is conducted and the amounts charged by the liquidators.

If the company is insolvent, then by its very nature, it is unable to settle its debts. In which case, it is incredibly unlikely (where the company is only cashflow insolvent, it is possible that creditors can be paid in full) that the company's shareholders will receive any amounts given that they can only be paid after creditors are settled in full with interest. On that basis, the creditor's interest takes priority as they will be looking to ensure that the liquidator maximizes any realisations to creditors. This would involve ensuring that the liquidator is progressing matters, ensuring that the liquidator is not incurring disproportionate fees (as this will only deplete the funds available to creditors).

**Question 2.6**

During a liquidation there is an expected recovery into the liquidation estate. The amount is such that the liquidation estate is no longer deemed to be insolvent and the official liquidator can settle all of the outstanding creditor claims (including interest) in full. The official liquidator has subsequently filed a revised certificate of solvency (CWR Form No 14) with the court. What impact will the change in solvency have on the liquidation committee, assuming one has been constituted? (4)

If the Official Liquidator changes the official liquidator's certification of the company's solvency or insolvency, and a liquidation committee has been constituted, they are required to reconstitute it.

In this instance, any creditor members of the committee will automatically cease to be members and the official liquidator will convene a meeting of the contributories in order to elect new members from amongst the company's contributories.

**Commented [ni12]:** Good answer. The 5th mark was reserved for those answers that mentioned *BTU Power Company* (which is cited in the course notes under section 4.2.6.2 removal).

**Commented [ca13]:** Question 2.6 Subtotal - 3.5/4 marks

For full marks needed to reference that the newly reconstituted LC will be comprised of not less than three, no more than five, contributories (Order 9, r.1 (3)).

### Question 2.7

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

Within 14 days of the order being perfected, the official liquidator shall file the order for dissolution with the Registrar of Companies.

Upon making the order for dissolution, the court will give directions in regards to the preservation, storage and destruction of the company's remaining books and records pursuant to Order 26, rule3(4) of the CWR. The official liquidator must comply with these directions.

As regards any unclaimed dividends, the former liquidator must ensure that these are dealt with in accordance with section 153 of the Companies Act. This section provides that the former liquidator becomes trustee of the unclaimed amounts and that at the end of one year from the date of dissolution, if any amounts remain unclaimed, these shall be transferred to the Minister charged with responsibility for Finance.

#### For full marks

- The liquidator shall retain the liquidation files in safe custody for at least 3 years pursuant to O.26, r.2(3) of the CWR.

### Question 2.8

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

As a liquidator, the practitioner has various powers available to them in order to investigate the conduct of the company, its directors and typically, the events that led to its insolvency. The powers will be available to official liquidators as opposed to voluntary liquidators, this is on the basis that a solvent liquidation will settle all debts without the requirements to investigate matters, however, if an investigate becomes required, then this will require the courts involvement and therefore an application for court supervision will be made.

The powers used most frequently are:

Commented [ca14]: Question 2.7 Subtotal = 4/5 marks

Commented [BB15]: Question 2.8 - Sub-total = 2/5

- With the assistance of the court, the liquidators are able to become involved with the Cayman Islands police in order to investigate the directors, staff and any service providers. And in some circumstances, institute and then conduct criminal prosecution of those people. **(1)**
- With court approval the OL has the power to exam persons and demand the delivery of any property or documents belonging to the company. **(1)**
- With court approval commence or defend legal action or other legal proceedings in the name of on behalf of the company
- Carry on the business of the company so far may be necessary if its beneficial to the winding up
- Dispose of company property
- Pay any class of creditors in full
- Sell any of the company's property by public auction or private contract with the power to transfer the whole of it to any person or sell the same in parcels.
- Raise or borrow money and grant securities or company property
- Engage attorneys and other professionals to assist.

The Liquidator may request approval from the creditors or contributories for all or part of the costs of the investigation.

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)**

In Section 101(3) of the Companies Act, the "relevant date" is also considered the date of

Commented [BB16]: Question 2.9 - Sub-total = 1/5

the event. For example, the “relevant date ” or date of the event would be the date in which the winding up commences. **(1)** Whereas in the case of a provisional liquidator’s appointment, the relevant date would be the date of their appointment.

Section 101(3) specifically refers to who may be required to complete a statement of affairs. Section 101(3)(c) for example, provides that anyone who is or has been an employee within the one year immediately preceding the “relevant date” can be required to complete a statement of affairs.

In practice, it is almost always the director(s) that complete the statement of affairs.

Your answer did not address the question, please see model answer below:

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

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

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

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

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

#### FACT PATTERN

##### SMB TECH CORPORATION

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

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

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

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

#### Question 3.1

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

**Commented [BB17]:** Question 3.1 - Sub-total = 3.5/5

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

Under Regulation 7 (1) of the Insolvency Practitioners' Regulations (2023 Consolidation) ("IP Regs") it is clearly stated that in order to act as liquidator, the person must have professional indemnity insurance up to a limit of at least US\$10 million in respect of each and every claim. Therefore, the nominated practitioner must increase the limited of the indemnity insurance in order to be appointed. (1)

As the nominated practitioner is situated in Hong Kong, they will be referred to as a "foreign practitioner". A foreign practitioner is unable to act as sole practitioner for the purpose of a provisional liquidation and therefore the joint appointment of a qualified insolvency practitioner is required. (1)

Provided that a professional insolvency practitioner is jointly appointed, and the nominated foreign practitioner is able to increase their professional indemnity insurance to at least US\$10 million in respect of each and every claim as well as at least US\$20 million in the aggregate (with a deductible of no more than US\$1 million), then finally they must ensure that they comply with the independence requirement detailed in regulation 6 of the IP Regs.

As a foreign practitioner, they will not be required to comply with regulation 5 of the IP Regs, the residency requirement. (½)

3 ½ marks - see below

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

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

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

A foreign practitioner who meets the independence and insurance requirements of Regulations 6 and 7 of the IPRs may be appointed by the Court as an official liquidator of a company jointly with a qualified insolvency practitioner (but not as sole official liquidator). A foreign practitioner need not meet the residency requirement of Regulation 5. (1 mark)

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

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

performance or non-performance of his duties as an official liquidator generally. (emphasis added). (1 mark)

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

### Question 3.2

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

In order to appoint a restructuring officer, a company must demonstrate:

- 1) That it is or will likely be unable to pay its debts in accordance with the definition provided in section 93 of the Companies Act (2023 Consolidation); (1)
- 2) That it intends to present a compromise or arrangement to its creditors, either pursuant to Cayman Islands Law or that of a foreign country or by way of a consensual restructuring. (1)

2 marks

### Question 3.3

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

Once a restructuring petition has been presented to the court, in accordance with Form Number 3A of the Companies Winding Up Rules (as amended), the following advertisements are required:

- 1) One advertisement in a newspaper having circulation in the Cayman Islands; (½) and
- 2) In a newspaper that has circulation in a country (or countries) that the petition is most likely to come to the attention of the creditors and contributories affected by the appointment. (½)

These advertisements are required to appear no later than 7 business days after the restructuring petition is filed (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)

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

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

Commented [BB20]: Question 3.4 - Sub-total = 4.5/6

- 1) Upon filing the petition for the restructuring officer's appointment, the company will benefit from an automatic worldwide moratorium. This will prevent any creditors from commencing legal proceedings against the company.  $\frac{1}{2}$
- 2) Directors are permitted to present petitions to appoint a restructuring officer without first presenting a winding up petition or obtaining a shareholder resolution.
- 3) Although only for the benefit of secured creditors, the appointment of a restructuring officer does not prevent secured creditors from enforcing their security without the consent of the court of restructuring officer. (1)
- 4) Should a creditor or contributory feel dissatisfied with the restructuring officer, they are able to apply to court for the removal and replacement of the restructuring officer. This should give the creditors some level of comfort that they are able to intervene should the restructuring officer not be acting in their best interests. (1)
- 5) Much like when a company is placed into administration in the UK, the restructuring officer is appointed instead of a liquidator on the basis that the outcome should be better than if the company were to be placed into liquidation. It is on that basis that creditors should feel more positive as regard to the outcome. (1)
- 6) As opposed to being placed into liquidation, having a restructuring officer in place allows prospective investors or purchasers to bid for the company as a whole or in part. Creditors will benefit from this as they could keep a customer or supplier. (1)

4  $\frac{1}{2}$  marks

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

### Question 3.5

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

Following receipt of a restructuring petition, an automatic moratorium prevents any creditors taking legal action against the company.

Commented [BB21]: Question 3.5 - Sub-total = 5/5



Every petition under Order 1A, rule 2 of the Companies Winding Up Rules (2023 Consolidation) will be heard in open court, unless the court directs, for some special reason, that it should be heard in chambers.

Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in court.

Upon the hearing, the court may:

- Make an order appointing the restructuring officer; (1)
- Adjourn the hearing conditionally or unconditionally; (1)
- Dismiss the petition; or (1)
- Make any other order as they deem fit (1). However, they cannot make an order placing the company into official liquidation. (1)

Note, the court has no power to wind up a company on the basis of a restructuring petition.

**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)

In addition to the Limited Partnership Agreement ("LPA"), ELPs are governed by The Exempted Limited Partnership Act (2021 Revision) (1) ("ELP Act") and the principles of common law and equity applicable to partnerships (1 mark) as modified by and the Partnership Act (2013 Revision). (1)

It is also important to note that the ELP Act does not have an English equivalent.

##### Question 4.2

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

In accordance with section 91(d) of the Companies Act, the Cayman Islands Court has jurisdiction to wind up a foreign company when they:

- 1) Have property located in the Cayman Islands;
- 2) Is carrying on business in the Cayman Islands;
- 3) Is the general partner of an ordinary limited partnership or an ELP; or
- 4) Is registered under Part IX of the Companies Act.

Side note - Part IX of the Companies Act requires a foreign company to register in the Cayman Islands when it establishes a place of business or commences carrying on business within the Cayman Islands.

##### 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)

Firstly, the Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign enforcements. On that basis, a judgement or order made by a foreign court has no direct legal effect in the Cayman Islands and is therefore not enforceable in the Cayman Islands by itself.

Secondly, a foreign judgement made by a court of a foreign country with the jurisdiction to make that judgment, which is final and conclusive on the merits, and not impeachable on

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

Commented [sp23]: Question 4.2 - Sub-total = 5/5

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

any of the grounds mentioned in Section 4(1) of the Foreign Judgements Reciprocal Enforcement Act (1996 Revision) or Section 30(1) of the Limited Act (1996 Revision), is entitled to recognition alone rather than positive enforcement.

Therefore, under common law, foreign judgements which are not registrable under the Foreign Judgements Reciprocal Enforcement Act (1996 Revision) must be enforced by commencing new action in the Cayman Islands. The foreign judgement will then be used as evidence of this debt.

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 = 1/4

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)**

Once appointed, the Trustee has a duty to administer the debtor's estate for the benefit of creditors.

In accordance with Section 80 of the Bankruptcy Act (1997 Revision), the Trustee is able to commence or defend legal proceedings relating to the property of the debtor. **(1)**

Under section 105 of the Bankruptcy Act (1997 Revision), a Trustee is able to disclaim onerous and unprofitable property in certain prescribed circumstances.

The Trustee has a duty to act in the best interests of creditors.

Under Section 78 of the Bankruptcy Act (1997 Revision), the Trustee has the power to sell all or part of the property of the debtor. That includes any goodwill from the debtor's business.

Please see model answer below:

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

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

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

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

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

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

**TOTAL MARKS: [100]**

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