



INSOL
INTERNATIONAL



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

Commented [BB1]: TOTAL = 74/100 - Very 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

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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.

Commented [BB3]: 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)

[The required consent to act that is signed by the proposed official liquidator(s) are provided in the Companies Winding up Rules (the "CWR") Order 3, rule 4, and must be prepared in the CWR Form No 20. (1)

The content of the consent to act will state the following:

- That the person(s) is a qualified insolvency practitioner and meets the residency requirement as per Regulation 5 of the Insolvency Practitioners Rules (the "IPR"), (1)
- That the person(s) or their firm meets the independence requirement as per Regulation 6 of the IPR, (1)
- That the person(s) or their firm are compliant with the insurance requirement as per Regulation 7 of the IPR, and (1)
- That the person(s) is willing to act as an official liquidator if appointed.] (1)

5 marks

Question 2.2

The proposed liquidators are employees of the accountancy practice Bodden & Ebanks Limited. Shortly prior to the hearing of the winding up petition of Bluesea, it transpires that Bodden & Ebanks Limited previously acted as auditors of Bluesea in 2021. Are the proposed liquidators still able to act in relation to Bluesea? Please provide an explanation for your answer. This information came to light after the proposed liquidators had already provided their consents to act; what should the proposed liquidators do in respect of the same? (5)

[Regulation 6 of the IPR stipulates that a qualified IP will not be appointed by the Court unless they are independent in relation to the company (1). As part of the independence requirement, IP's or their firm must not have acted as an auditor of the company that they are seeking appointment over 3 years (1) preceding the commencement of the liquidation.

As per the fact pattern Bodden & Ebanks Limited acted as auditors of Bluesea in 2021, thus it falls within the 3 preceding years. As a result, it fails the independence requirement. Considering this, they would not be able to act as the liquidators of Bluesea. (1)

In my opinion, this independence failure should have been identified prior to the provision of the consent to act. However, as they have now identified that they are not able to act due to the lack of independence they should submit an updated affidavit or notification to the Court identifying their lack of independence and their inability to act as

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

Commented [BB5]: Question 2.2 - Sub-total = 1/5

the liquidator.](1)

4 marks

Question 2.3

Commented [BB6]: Question 2.3 - Sub-total = 2/5

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

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

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

Using the facts above, answer the questions that follow:

Question 2.3.1 (0/1 mark)

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

[The qualifications for Tom and Jerry to act as Voluntary Liquidator as per the IPR include:

- Professional Qualifications as it pertains to acting as an Insolvency Practitioner (the "IP"),
- Residency requirement,
- Independence requirement,
- Insurance requirement,
- Type your answer here]

The correct answer is: There are none. (1 mark)

Question 2.3.2 (2/2 mark)

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 must be taken by Tom and Jerry within 28 days of their appointment include:

- Notice of winding up must be filed with the Registrar of Companies (the "Registrar"),
- The consent to act of the liquidators' must be filed with the Registrar,
- The declaration of solvency of the directors of the company must be filed with the Registrar. Failure to do this would result in the filing of a supervision petition to

place the company in Official Liquidation,

- Notice of winding up must be published in the Gazette, and
- Notice of winding up must be provided to the Cayman Islands Monetary Authority (the "CIMA") if the company is a regulated company in the Cayman Islands.] (2)

Question 2.3.3 (0/2 marks)

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

[Section 126 of the Companies Act stipulates that if the liquidation is continuing for a period in excess of one year, they would be required to convene an Annual General Meeting. At the meeting the liquidators would provide an account of the liquidation in the functional currency of the liquidation and a resolution of the company for the approval of their fees for voting by the attendees of the meeting that have the ability to vote.

The same is true for the final general meeting before winding up the company. (0)

The correct answer is:

Answer: (0.5 marks per point, maximum 2 marks)

- an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation; (0.5 marks)
- a fixed sum; (0.5 marks)
- a commission or percentage of the assets distributed or realised; or (0.5 marks)
- a combination of these methods. (0.5 marks)

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 has the ability to do the following upon hearing the winding up petition:

- Dismiss the petition,
- Adjourn the winding up hearing,
- Make a provisional order,
- Make any other order that the Court thinks is reasonable]

Question 2.5

Question 2.5.1 (4/4 marks)

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

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

Commented [ni8]: conditionally or unconditionally

Commented [BB9]: Question 2.5 - Sub-total = 7/9

Commented [ni10]: good answer

[Section 107 of the Companies Act and Order 5, rule 6 of the CWR state that an order of the Court can be made to remove liquidators following an application of a creditor or contributory of the company. This application is made by summons that are known as removal summons that are served on the official liquidator, each member of the liquidation committee, counsel for the liquidation committee and any creditors or contributories that the Court may direct.

The removal summons will be accompanied by an affidavit from the creditors or contributory containing the facts and matters that justify their desire for the removal of the liquidators and must also include a replacement liquidator.

The task of providing a good reason for the removal falls on the creditors and contributories. Some circumstances that in which the removal summons is made include, a conflict of interest, the liquidators are acting against the wishes of the creditor/contributory, misconduct, and failure of the liquidator to investigate the former director matters and affairs sufficiently.]

Question 2.5.2 (3/5 marks)

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

[The class of potential application varies in accordance with the solvency of the company. In circumstances whereby the company is solvent the potential applicant would be that of contributories, whereas in doubtful solvency or insolvency the applicant would be a creditor.

The reason for this classification is to facilitate the ranking/order of priority for stakeholders and creditors. Based on how the applicants are classed would impact the ranking in which they would be paid.

In solvent liquidations all affected parties will be paid in full, whereas in the insolvent liquidation not all affected parties would be settled in full. Considering this, the ranking/priority of payment would aid in determining the amount that would be provided to the creditor.]

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)

Commented [ni11]: A good, but not entirely clear and coherent answer. I think you understood the principles, but you have not expressed that fully and made it 100% clear that you do.

Also 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 [ca12]: Question 2.6 Subtotal 3.5/4 marks

[Order 9, rule 3 of the CWR provides guidance as it pertains to the reconstitution of the Liquidation Committees. According to the CWR, the liquidator shall take the following steps to reconstitute the liquidation committee:

- Any creditors that are a part of the liquidation committee shall cease to be members immediately upon the company being certified to be solvent.
- The liquidator will then convene a meeting of contributories in order to appoint new members from the contributories to replace any creditors that were removed.

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)

[The steps that a liquidator will need to take following the making of an order for dissolution are covered by Order 22, rule 2 of the CWR. According to the CWR the liquidator shall:

- File the order for dissolution with the Registrar of companies within 14 days from the date upon which the order was perfected.
- The liquidator shall then retain the books and records of the liquidation in whole or part for a minimum of 3 years or a time frame stipulated by the Court, after which the liquidator will destroy the books and records pursuant to Order 25, rule 2 of the CWR.
- In the event that there are unclaimed dividends the liquidator may act as Trustee of the unclaimed dividend and provide the terms for the remuneration.
- The liquidator shall act as Trustee for one year and provide unclaimed dividends less their fees to any party that is identified during the trust period. Any unclaimed dividends after the Trust period of one year will be termed over to the Cayman Islands government.]

For full marks references to the following should be included

- Upon making an order for dissolution, the court shall give directions in respect of the preservation, storage and destruction of the company's remaining books and records pursuant CWR O.26, r.3(4)

Question 2.8

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

[Liquidators are granted powers to investigate upon a winding up order being made. This is pursuant to Section 102 of the Companies Act. Per the Act, the general powers and duties of the liquidator include an investigation of the causes of a company's failure, and

Commented [ca13]: Question 2.7 Subtotal
4/5 marks

Commented [BB14]: Question 2.8 - Sub-total
= 1.5/5

the promotion and affairs of the company. (1) Any findings made can be can then be provided to the Court as a report.

The Court can also grant the liquidator power to perform the following:

- Assist the Royal Cayman Islands Police service to investigate the conduct of persons mentioned in section 101(3) of the Companies Act, and (½) provide an example of which persons
- Conduct a prosecution of persons mentioned in section 101(3) of the Companies Act.]

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)

[Pursuant to Section 101(3) the relevant date is the commencement date of the winding up. (1) In most cases this is upon presentation of the winding up petition. However, it is the earlier date of the following: In many cases, this is the presentation of the winding up petition (pursuant to section 100(2))

- The resolution for winding up being passed, (½)
- Period fixed in the Articles of Association of the company, (½)
- Event that gives rise to the requirement of winding up in the Articles of Association of the company, or (½)
- The appointment of a restructuring officer. (½) 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)

As it pertains to provisional liquidation, it shall be the date of the provisional liquidator's appointment.]

**** 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 [BB16]: Question 3.1 - Sub-total = 3/5

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

[According to the fact pattern the chosen Provisional Liquidator (the "PL") is based in Hong Kong (1), as a result of this he would not be able to be appointed as the PL in his sole capacity. This is due to the fact that he does not meet the requirements to be appointed as a PL.

In order to be appointed as PL in the Cayman Islands the residency requirement must be met in order for the Insolvency Practitioner (the "IP") to be appointed in their sole capacity. Since the chosen IP is based in Hong Kong, he does not meet this requirement and as such cannot be appointed in his sole capacity.

The chosen IP can be appointed as PL jointly with a Cayman Islands qualified insolvency practitioner and approved by the court as per Section 108 (1) of the Companies Act. (1)

Regulation 8 of the Insolvency Practitioner's Regulations (the "IPR") indicates that foreign practitioners can be appointed once they meet the independence and insurance requirements set out in regulation 6 and 7 of the IPR. Based on the case facts these are met. However, since the residency requirement is not the chosen IP must be appointed jointly. (1)

The Cayman Islands IP must be a qualified insolvency practitioner. This is someone that has the qualifications specified in the regulations made by the Insolvency Rules Committee under section 155 or such other qualifications that the Court considers appropriate for winding up a Company.]

3 Marks - to get the extra marks, you were needed to talk about the insurance limits in Regulation 7 of the IPRs and then provide commentary as against the question (ie the chosen liquidator doesn't have sufficient coverage and if not willing to take out extra coverage he/she couldn't act).

Question 3.2

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

[Pursuant to Section 91B (1) of the Companies Act, the company would be required to demonstrate the following:

- It is or is likely to become unable to settle its debts, and (1)
- There is an intention to propose a restructuring petition to its creditors.] (1)

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)

[Upon the presentation of the Restructuring Petition, there is a requirement to advertise the Restructuring Petition in accordance with Form 3A of the Companies Winding Up Rules ("CWR"), unless instructed by the Grand Court to do otherwise.

According to the CWR, the advertisement would be done as follows:

- Once in a newspaper that is circulated in the Cayman Islands, (½) and
- In a newspaper in the country or countries that the petition is most likely to come to the attention of most creditors and contributories. (½)

The CWR Order 1A, rule 1(6) stipulates that the advertisement must appear in the newspapers no more than seven business days after the Restructuring Petition was filed (½) and no less than seven business days before the hearing date.] (½)

Question 3.4

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

[The various elements of the new restructuring officer regime that assist in safeguarding the interest of the creditors are as follows:

- Moratoriums which serve as a stay of proceedings that allow the company some breathing space to effectively restructure the company without the threat of further or additional litigation against the company that may be to the detriment of the creditors. (1)
- Advertising of the restructuring officer appointment allows for the maximum number of creditors to be made aware of the circumstances. (1)
- Creditors with security over the whole or part of the assets of the company will remain entitled to enforce their security without leave of the Court. (1) However, they would not be able to do this on an individual basis and would need to benefit of the majority of the group of secured creditors which allows the entire creditor body to benefit.
- A scheme of arrangements that can be customized to suit the needs of the company specifically as opposed to the general liquidation process and terms can result in more benefits being earned by the creditors than under a liquidation.
- The new regime can allow the company to continue as a going concern as opposed to being wound up. Considering this, the refinancing and/or sale of the company at that stage is more beneficial to creditors than a liquidation as it may result in higher returns. (1)

4 marks - other considerations per the below:

- There are a number of provisions which prescribe specific notice and reporting requirements for the benefit of creditors. (3 mark)

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

- 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)
- 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)
- A creditor or contributory may apply for an order discharging the 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 that is available to the Court upon a restructuring petition is provided in the Companies Act Section 91B(3). According to the act the Court may:

- Appoint a restructuring order through a Court Order, (1)
- Adjourn the hearing, (1)
- Dismiss the petition, or (1)
- Make another order that the Court believes is fit (1) except place the company into official liquidation. (1)

The Court has no power to initiate the winding up of the Company through the Restructuring Petition.]

5 marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / ...

Commented [BB20]: Question 3.5 - Sub-total = 5/5

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, the operations of ELPs are also governed by the Partnership Act (2013 Revision) (1) and the Exempted Limited Partnership Act (2021 Revision) (1) (the "ELP Act"). The ELP Act was drafted with the Delaware limited partnership legislation as a basis and has no English counterpart. The ELP Act stipulates that some powers are subject to provisions included in the Limited Partnership Agreement.] and the principles of common law and equity applicable to partnerships (1 mark) as modified by the Partnership Act (2013 Revision). (1 mark)

Commented [BB21]: Question 4.1 - Sub-total = 2/3

Question 4.2

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

[The Cayman Islands court has jurisdiction to wind up a foreign company according to Section 91(d) of the Companies Act in the following circumstances:

- The foreign company has property located in the Cayman Islands,
- The foreign company is carrying on business in the Cayman Islands,
- The foreign company is the general partner of a limited partnership, or
- The foreign company is registered as a overseas company under Part IX of the Companies act. This requires the foreign company to register its place of business in the Cayman Islands or start carrying on business in the Cayman Islands.]

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

Question 4.3

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

[The judgement of a foreign court does not need to be registered and/or enforced within the Cayman Islands before it can be relied upon as the basis for seeking a winding up order. This is due to the fact that foreign court judgements have no direct legal effect in the Cayman Islands and are not enforceable. There are steps that can be taken to have them legally enforced though.

In the matter of Guoan International Limited (29 October 2021) it was determined that

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

creditors are able to rely on foreign judgements when seeking a winding up order without having them recognized or enforced in the Cayman Islands.]

Question 4.4

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

[The main statutory powers and duties of the Trustee pursuant to the Bankruptcy Act Section 37 the debtor's property is passed to, and vests with the Trustee, who will then administer the property. Section 80 of the Bankruptcy Act allows the Trustee to commence and partake in legal proceedings that relate to the property of the debtor which they was passed onto the Trustee.] (1)

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 ****

Commented [BB24]: Question 4.4 - Sub-total = 1/4