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

Summative Assessment (Final Examination)

Date: 23 - 24 November 2023

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

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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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Commented [BB1]: TOTAL = 69.5/100

Commented [BB2R1]: Mark adjusted to  
70/100

## INSTRUCTIONS

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

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

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

## ANSWER ALL THE QUESTIONS

### QUESTION 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

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

#### Question 1.1

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

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

#### Question 1.2

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

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

#### Question 1.3

Choose the **correct** statement:

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

- (a) 3

Commented [BB3]: Question 1 - Sub-total = 18/20

(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.

**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.

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

#### Question 1.14

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

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

#### Question 1.15

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

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



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

**Question 1.16**

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

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

**Question 1.17**

Select the **correct** statement:

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

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

**Question 1.18**

Choose the **correct** statement:

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

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

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

**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)

To qualify as an Official Liquidator (OR), they must be a "qualified insolvency practitioner", therefore meeting the requirements set out by the Insolvency Rules Committee (following S. 155 of the Co.s Act), or have qualification the Court decides appropriate.

So presumably the Consent to Act must not only include their consent to act, but their relevant qualifications, which according to the Insolvency Rules Committee Regs (2018), so are 1) a licensed insolvency practitioner in the designated qualifying countries (England & Wales, Scotland, Northern Ireland/ Republic of Ireland, Australia, New Zealand & Canada), OR be a qualified professional accountant as a member of an approved Institute, and be in good standing, with 5+ years insolvency experience and 2,500+ hours of chargeable insolvency work. (Ref Module notes pp 97/98), plus:

- They are resident in the Cayman Islands, (1)
- They hold a Trae & Business License to conduct such business
- They meet the Independence requirements. (1)
- They meet the insurance requirements (\$10M any one incident, \$20M total, minimum \$100K deductible, etc. (1)
- Provide security bond though not usually required.

If foreign liquidators, they can act if joint with resident liquidators, if they generally meet all of the same requirements, including being qualified in their country to perform equivalent functions, and independence and insurance requirements. Idem module notes pp19-21).

**3 marks**

Every winding up petition shall be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator (1 mark) stating that:

- he is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5 of the Insolvency Practitioners Regulations (IPRs); (1 mark)
- having made due enquiry, he believes that he and his firm meet the independence requirement contained in Regulation 6 of the IPRs; (1 mark)
- he and / or his firm are in compliance with the insurance requirement contained in Regulation 7 of the IPRs; (1 mark) and

he is willing to act as official liquidator if so appointed by the Court. (1 mark)

**Question 2.2**

**Commented [BB6]:** Question 2.1 - Sub-total = 3/5

**Commented [BB7]:** Question 2.2 - Sub-total = 2/5

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

It is generally clear that the proposed liquidators cannot have been auditors within the past 3 years. Since the facts indicate the firm acted as auditors in 2021, they have been auditors within the past 3 years and so are disqualified (among other reasons perhaps, it is a conflict of interest), and so they are not able to act. (1)

Assuming this was an oversight (court to determine), the proposed liquidators must declare their lack of independence due to being auditors in the past 3 years, which will disqualify them from being eligible for the appointment as liquidators. (1)

2 marks - no reference to the facts of the question or where the 3 year rule is taken from. 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 of their firm have acted as auditors within the 3 years immediately preceding the commencement of the liquidation, given Bodden & Ebanks Limited acted as auditors as recently as 2021 the proposed liquidators would not be regarded as independent. (1 mark)

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

### Question 2.3

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.

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

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

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

Using the facts above, answer the questions that follow:

**Question 2.3.1 (1/1 mark)**

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

There are no formal/ required qualifications to act as Voluntary Liquidators, (1)

**Question 2.3.2 (2/2 marks)**

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

Within 28 days of their appointment, the liquidators must File:

File with the Registrar:

- notice of the winding up
- their consent to act
- Declaration of Solvency (by Directors)

File with CIMA notice of the winding up, if a regulated business (2)

Publish in the Gazette, notice of the winding up (idem pp58-59)

**Question 2.3.3 (2/2 marks)**

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

Voluntary liquidators may be paid on the following basis:

- Hourly/ scaled rates, based on their time reasonably/ properly spent
- A fixed fee
- A percentage/ commission of the value of the realization of assets, or distributed
- Any combination of the above 3 methods (idem p62) (2)

**Question 2.4 (0/2 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)

On the contributories petition, it is noted the Court may address this point at the interlocutory stage, though they will consider the lengthy time requirements. Therefore, or alternatively, the Court might assume the applicant has standing (deferring the 'standing' issue until later), until the Provisional Liquidation appointment matter is heard, given the Court's objective that litigation should be conducted/ managed to be "just, expeditious and economical". (Idem p165)

**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.

Generally, an Official Liquidator (OL) can be removed by Court Order upon application of a creditor or contributory. Creditors can apply in an insolvency situation (having the ultimate interest) and contributories in a solvency situation (having the ultimate interest). (idem p 106)

I am sorry the above is not much of an essay, but it seems to answer the question, and I understand points will be deducted for adding unnecessary additional responses, so I am reluctant to add more to make this an "essay".

Who must such an application be served on? (4)

It is noted the "removal summons" must be served on the Official Liquidator (with 14 days notice), all Liquidation Committee members and their legal counsel, and if the Court directs, any other creditors or contributories. (idem pp105/106)

**Question 2.5.2 (2/5 marks)**

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

While I could reference certain aspects of the module notes in response, which I think are referenced in a few places, I understand the facts of the matter to be:

**Commented [BB9]:** Question 2.4 - Sub-total = 0/2

**Commented [ni10]:** this question asks what the Court's powers are 'upon the hearing of a **winding up petition**' not upon the hearing of a PL application. Therefore you have not answered the question correctly I'm afraid.

Also, I didn't really understand the thrust of the answer you have given here.

**Commented [BB11]:** Question 2.5 - Sub-total = 4/9

**Commented [ni12]:** good answer, but we were looking for explicit references to s. 107 of the Companies Act and CWR O.5, r.6 for the final two marks.

**Commented [ni13]:** or

**Commented [ni14]:** The question sought an answer that identified the true economic stakeholders, which are:

- in the case of a solvent liquidation, only the contributories (as creditors would all be paid in full and therefore have no interest in who is the OL); and

- in the case of an insolvent liquidation, only the creditors (as no contributories will be paid anything).

You have the gist here, but haven't really explained *why* each stakeholder group has the ultimate economic interest in which situation.

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).



- When the company is likely insolvent, it is the creditors that have the ultimate interest in the "liquidation" of the company,
- Where it appears unclear if the company is of doubtful solvency, or perhaps solvent, both creditors and contributories "may" have an ultimate interest, and
- Where the company appears insolvency, the contributories have the ultimate interest.

### Question 2.6

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

I understand a liquidation committee must be established unless the court decides otherwise, however, this question assumes a liquidation committee has been "constituted".

I assume an Official Liquidation would have occurred on the basis the company is insolvent.

Given the "revised certificate of solvency", I refer to the module notes which state "inherent in their eligibility to be a liquidation committee member, members will have an inherent interest in the estate.". If the company is now expected to be solvent, the creditors no longer have an interest in the liquidation, rather it is the contributories who have an interest.

I cannot see from the Module notes what the process is, in relation to the liquidation committee, when a previously expected insolvent company becomes, or is expected to become solvent.

Based on the course notes, the previous "creditor" Liquidation Committee no longer have a direct interest in the Liquidation, and so I would guess:

- The Committee should be dissolved, because they are not in a position to act in the interests of contributories
- Taking this back to a solvency company situation, it would then be for general meetings of members to make the relevant decisions required at their level.

Note the relevant references in the CWR are as follows: Order 9, rule 8 (b) where a creditors claim has been paid in full the creditor(s) membership will be automatically terminated. Accordingly, the LC will need to be reconstituted and a revised certificate (CWR Form No 15) filed with the court so that the committee is comprised of not less than three, no more than five, contributories (Order 9, r.1 (3)).

Commented [ca15]: Question 2.6 Subtotal = 3/4

### Question 2.7

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

Following an order for dissolution, S 153 of the Companies Act and Order 23 of the CWR, provide for:

- Set up a trust account for unclaimed dividends/ uncleared cheques
- Transfer to the Liquidator title of undistributed assets
- Payments from the Liquidator's trust account for undistributed assets/ funds
- Payment of any former Liquidators fees/ expenses
- After one year, transfer any remaining funds/ assets to the Financial Secretary
- Retain liquidation files for 3 years after dissolution (idem)

Commented [ca16]: Question 2.7 Subtotal  
3/5

### Question 2.8

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

Commented [BB17]: Question 2.8 - Sub-total  
= 2/5

The case facts state this is an Official Liquidation and not a Voluntary Liquidation.

Upon appointment of a liquidator, all of the powers of the directors cease automatically, unless expressly reserved.

Investigative powers:

The course notes indicate the OL has "broad investigative powers", including to determine the cause of company's failure and (if applicable) understanding its general promotion and business dealings and affairs, which findings may be reported to the court.

(1) The OR may also seek court permission to assist RCIP or CIMA to investigate conduct, or criminally prosecute, officers/ directors, professional service providers or recent employees. (1) The OR may also seek court permission to examine persons to deliver documents or property of the company in certain circumstances, which may include examination or evidence by affidavit (Idem p100)

Duties:

The OR must call a creditor's or contributories meeting (depending on solvency) within 28 days of the winding up order. This would be a very long answer if I listed all of the details of each, which I will not do, as they are not listed in the module notes as duties, but as powers... (Idem 101-102)

The OR has Part I and Part II power, and in effect, these are duties, but either duties the OR possesses with or without court approval, or for which he/ she requires court approval.

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)

**Generally, relevant persons must provide a statement of affairs, verified by affidavit, not more than 21 days after being requested by the Official Liquidator. In terms of the meaning of "relevant date" for this question, referring to the Companies Act information provided by Conyers along with section 1 of the module, S 101(3) states relevant persons include former directors, service providers (I don't see any "backstop time limit for either of these), or employees of the company for 1 year preceding the "relevant date", which seems to be the meaning of relevant date for the purpose of this question. S 101(6) states the relevant date for this section means either when the Provisional Liquidator was appointed, otherwise, at the commencement of the winding up (1), the latter being clarified further below. (Idem Conyers Companies Act)**

If the commencement of the winding up, happens to be the relevant date, Section 100 of the Companies Act (2023 Revision) indicates the deemed commencement of a winding up by the Court In many cases, this is the presentation of the winding up petition (pursuant to section 100(2)) is either:

- Upon the company passing a resolution to voluntarily wind up (½)
- When the duration of a company is for a fixed period, or a company it to be wound up on the occurrence of an event, both per it's articles, and that period expires or that event occurs (½)
- The date of a petition being presented to appoint a Restructuring Officer, if not discharged (does not seem relevant in this case) (½)

Commented [BB18]: Question 2.9 - Sub-total = 3/5

- Otherwise when the petition for winding up was presented (Idem p 83) (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)**

**\*\* 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 [BB19]: Question 3.1 - Sub-total = 2/5

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

The IP Regs state the qualifications/ requirements to act as Official Liquidator, which S 89 of the Companies Act, includes Provisional Liquidators (which is critically important to this situation). (Idem p 18)

It should be noted various other requirements must be met in addition to the insurance requirement, including in relation to qualifications, residency and independence. (Idem p 18/19)

The IP Regs state the minimum insurance requirements are "at least" US\$ 10M each and every claim (and \$20M aggregate). (1) The module notes state that nothing in the Regs prevents the Court ordering that an Official Liquidator shall (as note this includes Provisional Liquidators) "procure professional indemnity insurance... with a limit of coverage in excess of \$10M **OR** with an aggregate limit in excess of \$20M, **OR** procure the issue of a security bond to cover acts of fraud or dishonesty...in which case the premium shall be paid out of the assets of the company as an expense of the liquidation". (idem p 19/20).

Based on the above, it appears the court has discretion to accept (in the alternative to the \$5M per claim), 1) an aggregate limit of \$20M, OR, the appropriate security bond as noted, which notably, the premium can be paid for out of the estate. (1) Therefore, if the proposed provisional liquidators can meet either of these exceptions, it appears the court can accept their appointment, otherwise, it seems they are bound by the IP Regs which among other things, require a \$10M limit each and every claim...

2 marks - see model answer below

The chosen provisional liquidator of SMB 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 6 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)

S 91B(1) of the Companies Act provides for a company to petition the Court to appoint a restructuring officer(s), if they can demonstrate:

- It either is or is likely the company will be unable to pay its debts (1) (so considering the relevant insolvency test, since it varies), AND the company intends to “present a compromise or arrangement” to the creditors, (1) known as a Restructuring Petition which the company can present without a company’s members resolution or the power to do so according to its Articles. As with the former provisional liquidator requirements, again, the Company must satisfy the “two-limb test” references above, being the company 1) is or likely to become insolvent (unable to pay debts when due), and 2) intends to present a restructuring proposal to creditors. Based on Re Oriente, the Court must balance the interests of stakeholders considering the progress of the restructuring proposal in relation to the company’s ability to present the restructuring petition. (Idem p 183/184)

2 marks

### Question 3.3

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

Though the Grand Court can order otherwise, upon presentation of the Restructuring Petition, it must be advertised per CWR Form Number 3A, being one time in a newspaper that has 1) circulation in Cayman Islands, (½) and 2) circulation in any country(s) most likely to bring it to the attention of creditors/ contributories. (½) The ads must appear within 7 business days of the Restructuring Petition being filed and also within 7 business days of the hearing date. (½) and not less than seven business days before the hearing date (1/2 mark). Exceptionally, the petition may be filed on an “interim basis” subject to the Restructuring Petition hearing can still be made “ex parte”, if the circumstances are appropriate, however to clarify, this differs from the former Provisional Liquidator process where applications were generally made “ex parte”. (idem p 185)

Commented [BB20]: Question 3.2 - Sub-total = 2/2

Commented [BB21]: Question 3.3 - Sub-total = 1.5/2

### Question 3.4

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

Firstly it should be noted that some or all of these safeguards apply to contributories, however, the following is focused on creditors as the question indicates. (6)

The new restructuring regime assists in safeguarding the interests of creditors in the following ways:

- Creditors, upon the required 3 days notice, can appear/ be heard at the, and can express their support or opposition to the appointment, and (1)
- If the appointment is approved, they can state if they support or oppose who the company nominates as RO, (1)
- If the creditor opposes the nominee RO, they can nominate another IP subject to consent to act.

Subject to the above, the "key protections" noted in the module notes are:

- A creditor (or contributory, though I won't keep repeating as this is going beyond the bounds of the question) can apply to Court to vary or discharge the RO Order appointment (1)
- Creditor can also make an application to court for the replacement or removal of an RO. If removed, they must report to stakeholders and hand over all of files to their successors. (1)
- Secured creditors continue to be entitled to enforce their security, without permission of the Court or the RO. (1)
- Creditors can also present a winding up petition, with court permission, after a RO petition has been made.
- The Court has the ability to approve or discharge the RO Order, which should be in the best interest of stakeholders obviously including creditors.
- If the restructuring fails, the winding up's deemed commencement is the date of presentation of the Restructuring Petition, which pushes back the backstop date for claw-back of preference payments and invalidation of transactions in the "twilight period" from the Restructuring petition being presented an the winding up order. (idem 188-190)

5 marks

### Question 3.5

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

Upon a Restructuring petition being presented, an automatic stay takes effect. Restructuring petitions are to be heard within 21 days of being presented, balancing the urgency for companies, and creditors if the petition is not "bona fide", giving the Court this power to decide. After hearing the Restructuring petition, the Court can:

Commented [BB22]: Question 3.4 - Sub-total = 5/6

Commented [BB23]: Question 3.5 - Sub-total = 5/5



- Order the appointment of a Restructuring Officer (RO) (1)
- Adjourn the hearing either unconditionally or conditionally (1)
- **Dismiss the Restructuring Petition (1)**
- **Decide to make any order they think appropriate, (1) other than putting the company in liquidation (1) (as generally, unlike the former Provisional Liquidator regime, the RO has no pre-requisite for a winding up petition to have been presented. So it is stated the Court cannot wind up based on a Restructuring petition. (Idem 185-187)**

5 marks

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

QUESTION 4 FOLLOWS ON NEXT PAGE / . . .

#### QUESTION 4 - GENERAL QUESTIONS (15 MARKS)

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

##### Question 4.1

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

The ELP is also governed by the Exempted Limited Partnership Act (2021 Revision) (1) (ELP ACT) and also the Partnership Act (2013 Revision). (1) The ELP Act states the principles of equity and common law that apply to partnerships also apply to ELP's. (1) The ELP Act states that specific "statutory powers or prohibitions" are expressly provided for in the Limited Partnership Agreement. (Idem p 155)

Commented [BB24]: Question 4.1 - Sub-total = 3/3

##### Question 4.2

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

S 92 (d) of the Companies Act states the situations where the Cayman Islands court has jurisdiction to wind up a foreign company, which is when:

- The foreign company has property in Cayman
- The foreign company carries on business in Cayman
- The foreign company is the general partner of an Exempted Limited Partnership or an ordinary limited partnership
- The foreign company is registered under the Companies Act Part IX (which relates to Overseas Companies (Idem Conyers Companies Act Notes).

In relation to the last item, the module notes state that the Companies Act Part XI (though I believe this is meant to be Part IX), states a requirement that foreign companies register in Cayman if it commences carrying on business, or even establishes a place of business. (Idem p 206)

Commented [sp25]: 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 introduction to the module notes indicate a judgment (or order) of a foreign court "has no direct legal effect in the Cayman Islands" (and further that it is not enforceable without steps being taken. (Idem p 212). The latter part above regarding enforcement does not seem directly relevant, but the first part about having no direct legal effect leads

Commented [sp26]: Question 4.3 - Sub-total = 0/3

me to believe it cannot be relied upon as a debt, or in relation to the insolvency test. Therefore, I would conclude that for a Cayman court to proceed with a winding up order, there would need to be recognition (which may include registration and/ or enforcement mentioned).

Furthermore, as noted in Q 4.2, Cayman has its own rules for winding up foreign companies, and so presumably a foreign country could have rules that enable it to windup the company mentioned in relation to which there is a judgment in a foreign court.

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 [BB27]: Question 4.4 - Sub-total = 3/4

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 a trustee in bankruptcy are as follows:

- Once a provisional or absolute order has been made, the debtor's property immediately passes/ vests in the Trustee, so the Trustee has the duty to take possession of and responsibility for it. (1) -
- The module notes say the "Trustee is attached to the Court", to administer the debtor's estate according to the Bankruptcy Act.
- While a provisional order is in place, the Trustee must preserve the debtor's property, which may be returned if the provisional order is revoked. **section 38 of the Act**
- The business of the debtor may be carried on as "necessary or expedient", if it will be beneficial for the winding up or a sale of the business.
- To bring or defend legal proceedings related to the debtor's property. (1)
- To collect and decide on proofs of claim from creditors (1) (according to the Grand Court Bankruptcy Rules).
- If an absolute order is made, to administer the estate for the creditor's benefit. (Idem 221-222).

You would have received full marks if you had referred to the relevant section of the bankruptcy act in one of your examples, as indicated above in your answer.

An example of Trustee's powers (with reference to a section of the Bankruptcy Act) is the ability (i.e., power/ duty) of the Trustee to disclaim unprofitable/ onerous property in "certain prescribed circumstances", according to S. 105 of the Bankruptcy Act.

TOTAL MARKS: [100]

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